Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

MICHAEL R. CUENCA,
Petitioner,

vs.

UNIVERSITY OF KANSAS,
MYRON A. KAUTSCH,
JAMES K. GENTRY
Respondents.

On Petition For Writ of Certiorari To
The United States Court of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. *In a Title VII, 42 U.S.C. §§ 1981 & 1983 civil rights case, does evidence of illegal motivation presented under Section 107* preclude Rule 56 summary dismissal in civil rights cases; does this Court's* Desert Palace v. Costa *decision abrogate or alter* McDonnell Douglas*; and does satisfaction of Section 107 establish liability?*

2. *In a Title VII, 42 U.S.C. §§ 1981 & 1983 civil rights case, do the courts have the authority to rule whether a plaintiff's protected opposition was "unreasonable" and therefore not protected; can the courts dismiss all of a plaintiff's claims if any one instance of a plaintiff's opposition is ruled "unreasonable"; what effect, if any, does such a determination have on a plaintiff's other "reasonable" claims, and should such a consideration be left to juries?*

3. *In a Title VII, 42 U.S.C. §§ 1981 & 1983 civil rights case, do the courts have the authority to require that plaintiffs must satisfy a subjective level of a degree of harm to survive summary judgment; should such a consideration be limited exclusively to a determination of damages; and should such a consideration be left to juries?*

4. *Have the lower courts violated petitioner's Seventh Amendment rights to a jury trial by dismissing his case with rulings that conflict with U.S. Supreme Court and Tenth Circuit law?*

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* Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B)

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption of case.

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OPINIONS BELOW

On May 9, 2003, the United States District Court for the District of Kansas issued a MEMORANDUM AND ORDER (Appendix A) and JUDGMENT IN A CIVIL CASE (Appendix B) denying petitioner's motion for summary judgment/partial summary judgment and granting respondents' motion for summary dismissal.

On June 15, 2004, the United States Court of Appeals for the Tenth Circuit issued an ORDER AND JUDGMENT (Appendix C), affirming.

On July 28, 2004, the United States Court of Appeals for the Tenth Circuit issued an ORDER (Appendix D), granting panel rehearing for the limited purpose of modifying its June 15, 2004 order and judgment as noted in the written order. Other than the changes noted the petition for rehearing en banc was denied.

STATEMENT OF JURISDICTION

Petitioner seeks review of the May 9, 2003, memorandum and order of the United States District Court for the District of Kansas, dismissing in toto petitioner's civil rights claims. Petitioner seeks review of the June 15, 2004, order and judgment and the July 28, 2004, order of the United States Court of Appeals for the Tenth Circuit, affirming the District Court's ruling. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254 (1). This Petition is timely filed because it was mailed within ninety days of July 28, 2004, the date a motion for rehearing was denied in the court below. (Rules 13.3 and 29.2.)

Jurisdictional basis for the Tenth Circuit is 28 U.S.C. § 1291, and for the District Court, 28 U.S.C. §§ 1331 and 1337.

STATUTES INVOLVED

U.S. Constitution, Amendment VII, which provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-3 et seq. ("Title VII"), which in pertinent part provides that it is an:

> unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by [Title VII].

Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), which in pertinent part provides that an unlawful employment practice:

> is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

This case is a civil rights case, brought under 28 U.S.C. § 1331 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-3 et seq. ("Title VII") and, with regard to petitioner's claims against individual Defendants Kautsch and Gentry, pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 1981 and 1983.

Petitioner Michael R. Cuenca was an Assistant Professor of Journalism at the University of Kansas who was terminated after a negative tenure review.

Throughout his seven-year employment at the University, petitioner was an outspoken critic of the employer's handling of minority and gender issues and discrimination/retaliation grievances, who had eventually filed his own discrimination and retaliation griev-

ance. Petitioner served in a University-appointed position in which his responsibility was to coordinate the faculty oversight of the climate at the University for its minority and women employees. In this position, petitioner was outspoken about the necessity for more effective methods of raising the low numbers of minorities and women employed by the University.

The employer University had been determined by the Office of Federal Contract Compliance Programs (OFCCP) to be "underutilizing" minorities and women and the employer was laboring under an agreement to remedy their noncompliance with Executive Order 11246, which requires specific protections for employees and statistical monitoring of employment decisions.

During this time period, the number of federal civil rights lawsuits filed against employer University alleging discrimination rose from a total of 9 between 1988-1994 to 35 between 1995-2001.

After filing his own grievance, petitioner became a leader of the workplace civil rights movement as well as the most media-visible critic of administration policies, co-founding the Kansas University Sexism and Racism Victims Coalition, publishing a web site dedicated to the Coalition's activities, and writing letters to the editor and guest columns published by the university and community newspapers.

From the time of his initial internal grievances, both informal and formal, petitioner experienced one adverse employment action after another. His immediate supervisor threatened him with isolation if he filed a race-based complaint. Defendant Kautsch, who was dean of the Journalism school, attempted to terminate him in proceedings contrary to University policy. The University refused to investigate his grievance. Defendant Gentry, who replaced Kautsch as dean, excluded petitioner from activities and favorable assignments and misrepresented his employment record. Eventu-

ally, Gentry suppressed evidence of petitioner's record during an up-or-out employment evaluation and lied to the decisionmakers regarding petitioner's record.

As a result of developments such as the death of a magistrate judge and retirement of Petitioner's first attorney, the case stretched out in the District Court for more than five years, resulting in an extraordinarily lengthy time for the case to come to dispositive motions. During this long period, defendants continued to supply additional causes of action and evidence of their illegal animus, in arrogant defiance of all civil rights statutes and in disregard for the heightened scrutiny they were under during the pendancy of the case.

Petitioner filed for summary judgment in the District Court, submitting five separate documented direct statements of illegal intent and explaining their probative value under Section 107. Petitioner's motion for summary judgment detailed 12 causes of action.

Respondents filed for summary dismissal, but their motion was filed with more pages than the District Court's rules allow, so defendants moved to substitute a conforming motion. In ruling upon the Petitioner's motion for summary judgment and the Respondents' motion to substitute a conforming motion for summary dismissal, the District Court granted the Respondents motion to substitute a conforming motion, then granted that motion to dismiss without allowing petitioner the opportunity to respond to that motion.

The District Court accepted all of the facts alleged by petitioner. No facts or findings of fact are at issue.

In denying petitioner's motion for summary judgment and granting respondents' motion for summary dismissal, the District Court did not address Petitioner's Section 107 evidence and arguments and relied solely on a *McDonnell Douglas* analysis of the case.

The Tenth Circuit affirmed the dismissal, refusing to require the District Court to specify its reason for not

addressing the Section 107 case, while accepting and affirming the District Court's failure to draw all necessary inferences in favor of petitioner, failure to accept the petitioner's evidence of pattern and practice, and its weighing of evidence and determinations of credibility in favor of respondents.

REASONS FOR GRANTING THE WRIT

I. To clarify for the lower courts whether evidence of illegal intent presented under Section 107 precludes Rule 56 dismissal, whether *Desert Palace* abrogates or alters *McDonnell Douglas*, and whether satisfaction of Section 107 establishes liability.

Petitioner filed a motion for summary judgment in the District Court (Appendix D), arguing that the documented, uncontroverted evidence of illegal intent and motivation precluded summary dismissal and established liability against respondents. Petitioner cited Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), which states that:

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Petitioner's motion and Section 107 arguments were filed six months before this Court's decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003), which affirmed the authority and specificity of Section 107.

In petitioner's reply to respondents' original motion for summary judgment, he expressly reminded respondents and the District Court that he was presenting a Section 107/*Price Waterhouse*[1] case and argued that:

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[1] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

> Section 107 is a *statute* that expressly specifies a condition of liability. It is not a legal precedent or landmark ruling, subject to re-interpretation or disregard. Plaintiff proved Section 107's condition of liability by proffering direct evidence that illegal reasons motivated defendants' actions at least in part. No weighing of circumstantial evidence is necessary. No inferences are necessary. Liability is established.

Pl.'s Reply to Def.s' Response to Pl.'s Mot. for Summary Judgment, Dist. Ct. doc. 210, at 1.

Even though petitioner made it this clear that the case resolved on Section 107 and this Court's *Price Waterhouse* decision, neither the defendants nor the District Court even mentioned Section 107. Ignoring petitioner's Section 107 arguments, the District Court dismissed petitioner's claims in toto. The Court of Appeals in their affirmation, could only guess why:

> Cuenca argued to the district court that his case should be governed by the mixed-motive analysis set forth in § 107 of the 1991 Civil Rights. The district court did not directly address this argument. It may have rejected Cuenca's mixed-motive analysis, however, based on its conclusion that he had presented no direct evidence of discrimination and retaliation.[2]

Order and Judgment of the App. Ct., App. C, p. 68.

By the time briefing had ended, plaintiff was proffering six statements of illegal motivation:

> In 1995, defendant Kautsch stated in a letter to his superiors that he was attempting to termi-

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[2] Petitioner argued in requesting rehearing that the Appeals Court had no jurisdiction to review a decision that was not even made by the lower court. See *Tonnas v. Stonebridge* 78 Fed. Appx. 966, 968 (5th Cir. 2003) ("the courts' reasoning normally should appear, in some form, in the judicial record"), *Cavegn v. Twin City Pipe*, 223 F.3d 827 (8th Cir. 2000) (case remanded for district court's ruling).

nate plaintiff because plaintiff was "making demands and stating expectations." In 1995, plaintiff's supervisor threatened plaintiff with retaliation if he filed a race-based complaint. In 1997, defendant University suspended plaintiff's internal complaint and their Director of Equal Opportunity stated under oath that he did so because defendants' counsel blamed plaintiff for failed mediation. In 1999, Professor Hoy stated in plaintiff's tenure dossier that plaintiff should not be granted tenure because of plaintiff's opposition to discrimination. In 2000, plaintiff's supervisor published an editorial, claiming to speak for "many of us on the faculty" and stating that plaintiff's civil rights activism and his lawsuit would have an "adverse impact" on the School of Journalism. In 2003, defendants' counsel filed a brief in this case wherein they cited plaintiff's published statements of opposition to discrimination in their workplace as justification for plaintiff's colleagues' animus. Six statements, made over seven years by four individuals and by defendants' counsel, clearly establish that defendants harbored illegal animus against plaintiff for his individual grievances and for his public support for the rights of others. The statements establish not only illegal animus, but also that defendants actually believed their illegal animus was justified. Consequently, no inference is necessary to divine that illegitimate reasons motivated defendants, because in those statements they clearly and expressly connected their actions with plaintiff's protected speech, his race-based discrimination complaint, and his civil rights activism. These statements are *material* for purposes of proving intent under Section 107. All other facts and defenses of defendants

> are now rendered immaterial, per *Hinsdale*, cited above, and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), cited in the conclusion. (Citations omitted.)

Pl.'s Reply to Def.s' Resp. to Pl.'s Mot. for Summary Judgment, (Dist. Ct. Doc. 210, at 4).

In dismissing petitioner's claims, the District Court and the Appeals Court relied on a strict interpretation of the traditional *McDonnell Douglas* method of proof in civil rights cases, even though petitioner had argued in his first summary judgment brief that:

> the "pretext" phase of the framework only applies in those Title VII cases wherein the plaintiff relies on circumstantial evidence that requires an inference by the trier. In the event plaintiff can produce direct evidence that either discrimination or retaliation motivated a business decision even in part, Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B) "provides that an unlawful employment practice is *established* whenever race, color, religion, sex, or national origin was a motivating factor, even though other factors also motivated the practice." *EEOC Compliance Manual*, Section 8, page 8-16 (emphasis added). At this point, the employer cannot escape liability; it can only limit the damages available to the plaintiff by proving that there was at least one legitimate business reason for its decision. *Davey v. Lockheed Martin Corporation*, 301 F.3d 1204, at 121 (10th Cir. 2002). See also *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999), cert. denied 1999 U.S. LEXIS 4948 (1999).

Mem. in Support of Pl.'s Mot. for Summary Judgment/Partial Summary Judgment, App. E, p. 93.

As detailed in that quote from petitioner's summary judgment memo, even prior to *Desert Palace* the Tenth

Circuit had ruled that if a plaintiff satisfied Section 107 the employer could no longer escape liability, per *Davey* and *Medlock*. As petitioner had argued, liability was established by his evidence of illegal motivation. These lower courts, however, refused to accept the statements of intent as having any impact at all in this case. Among other rationale, the Appeals Court fell back on a ruling that because *Desert Palace* wasn't the law when petitioner filed his summary judgment motion, the District Court wasn't bound to apply Section 107 as it was written because the precedent in the Tenth Circuit was that Section 107 had to be satisfied with direct evidence.[3] But, as petitioner has pointed out, the District Court didn't rule on petitioner's Section 107 evidence and the Appeals Court was merely guessing about the District Court's reasoning. In light of *Desert Palace*, which had become the law by the time the Appeals Court entered its affirmation, the District Court's decision should have been reversed.

Even though Section 107 has been in effect for more than a decade, the Courts still don't seem to understand its implications. But, as this Court ruled in *Desert Palace*, the wording is simple and straightforward: to establish an illegal employment action, "a plaintiff need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to 'any employment practice.'" *Desert Palace*, at 8. Even in the time since that clarification, the courts seem to be in denial of the simplicity of the law and in disarray over its application. Some lower courts have found that the ruling abrogates or at least alters *McDonnell Douglas*,[4] while

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[3] See Order and Judgment of the App. Ct., App. B, p. 68.

[4] See, e.g., *Rachid v. Jack in the Box, Inc.*. 376 F. 3d 305, 312 (5th Cir. 2004), *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003), *Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc.*, 285 F. Supp. 2d 1180, 1196 (N.D. Iowa 2003); *Griffith v. City of Des Moines*, 2003 U.S. Dist. LEXIS 14365, 2003 WL 21976027,

others have ruled that it does not.[5] Still others have ducked the issue.[6] Several law review articles have been published that speculate on the demise of *McDonnell Douglas*, comprehensively presenting the conflicting attitudes and approaches of the courts.[7]

II. To settle the issue of whether the courts have the authority to rule that a plaintiff's Title VII protected opposition is "unreasonable" and therefore not protected, whether or not all of a plaintiff's claims of retaliation can be dismissed if any one instance of a plaintiff's opposition is ruled "unreasonable"; what effect, if any, such a determination has on a plaintiff's other claims; and whether such a determination should be left to juries.

In affirming the dismissal of petitioner's claims, the Appeals Court ruled in part that petitioner's opposition had been unreasonable and therefore petitioner's claims could be dismissed as unprotected.

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at *12 (S.D. Iowa July 3, 2003); *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 992 (D. Minn. 2003).

[5] See *Read v. BT Alex Brown Inc.*, 72 Fed. Appx. 112, 115 (5th Cir. 2003) (unpublished); see also *Herawi v. Ala. Dep't of Forensic Scis.*, 311 F. Supp. 2d 1335, 2004 WL 728408, at *8 (M.D. Ala. 2004); *Winter v. Bank of Am., N.A.*, 2003 U.S. Dist. LEXIS 24790, 2003 WL 23200278, at *3 (N.D. Tex. Dec. 12, 2003).

[6] See *Kammueller v. Loomis, Fargo & Co.*, 2004 U.S. App. LEXIS 18015 (8th Cir. 2004), *Roberson v. Alltell Info. Services*, 373 F3d 647 (5th Cir. 2004), *Carthon v. Johnson Controls, Inc.*, 100 Fed. Appx. 993, 996 (5th Cir. 2004).

[7] See also Articles: Van Detta, "'Le Roi Est Mort' Redux: Section 703(M), Costa, McDonnell Douglas, and the Title VII Revolution – A Reply", 52 Drake L. Rev. 427 (2004); Hedican, Hedican & Hudson, "McDonnell Douglas: Alive and Well", 52 Drake L. Rev. 383 (2004); Van Detta, "Requiem for a Heavyweight: Costa as a Countermonument to McDonnell Douglas – A Countermemory Reply to Instrumentalism", 67 Alb. L. Rev. 965 (2004).

This Court has not addressed the question of whether a complainant's opposition to allegedly illegal activity can be considered "unreasonable" to justify dismissal or even whether the lower courts have the authority to make such a subjective determination when considering summary dismissal. However, the Tenth Circuit has ruled that a complainant's opposition can be subjectively determined to be "unreasonable", rendering it unprotected, *Robbins v. Jefferson County School District* 186 F.3d 1253 (10th Cir. 1999).

Other courts of appeals also have empowered themselves with the subjective determination of the "reasonableness" of a complainant's opposition.[8]

Accusations of negative behavior are accepted as being among the most common forms of retaliation. So how is it that courts can justify accepting such accusations to dismiss a plaintiff's case? The subjectivity of the determination of what constitutes "unreasonable" opposition represents real peril for plaintiffs in civil rights cases. If allowed to continue, this practice of dismissing the cases of plaintiffs who a court determines to be a "troublemaker," can and will likely be abused by unsympathetic courts to help employers silence dissent, seriously chilling opposition to illegal employment actions.

In dismissing and affirming the dismissal of petitioner's case, the District Court and Appeals Court rationalized all of the retaliatory acts against appellant by parroting respondents' argument that appellant de-

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[8] See *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976), *Curl v. Reavis*, 740 F.2d 1323, 1329 (4th Cir. 1984), *Jones v. Flagship Int'l*, 793 F.2d 714, 728 (5th Cir. 1986), *Kempcke v. Monsanto Co.*, 132 F.3d 442, 445 (8th Cir. 1998), *Silver v. KCA, Inc.*, 586 F.2d 138, 140 (9th Cir. 1976), *Rollins v. State of Florida Dept. of Law Enforcement*, 868 F.2d 397 (11th Cir. 1989), and *Pendleton v. Rumsfeld*, 202 U.S. App. D.C. 102, 628 F.2d 102, 108 (D.C. Cir. 1980).

served their animus.[9] Respondents' evidence for this argument was feeble, consisting of two newspaper columns/letters that were written after the last of the actions in this case and another that was an email written after plaintiff's tenure review—both written a full six years after petitioner's initial protected opposition. Consequently, those criticisms by petitioner could not possibly have motivated or justified respondents' prior actions at the time, as is required of legitimate business reasons under *Price Waterhouse* (490 U.S., at 252). The only piece of evidence they submitted that had occurred during the case—and not until a full five years after petitioner's first protected activities—wasn't even a statement by petitioner, it was petitioner's supervisor's subjective negative assessment of petitioner directed at petitioner in an email.

Respondents didn't even allege or argue that the examples of petitioner's opposition were disruptive or extreme, which the Tenth Circuit had previously established as requirements of unreasonable opposition under *Robbins*. And the point to be emphasized here is that the evidence was exclusively of verbal opposition: no disruptive actions or violent acts, just dissent in the form of published messages and commentaries. Even with six years of hyper-scrutiny of petitioner, respondents could not produce even minimal evidence to

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[9] Defendants had not introduced this argument until their summary judgment reply, and the district court allowed plaintiff a surrreply because of the new issue. In this surreply, petitioner pointed out how the 10th Circuit has previously ruled that late introduction of new and subjective reasons for their actions constitutes additional proof of adverse employment actions and pretext, and that accusations of being a troublemaker constitute adverse employment actions. And most importantly, by connecting their animus with plaintiff's public criticism of their record on civil rights, they directly connected their animus and retaliatory actions to plaintiff's protected opposition, thereby establishing an unlawful employment practice under § 107.

characterize petitioner's opposition as being disruptive or having been outside the normal channels of opposition. They criticized petitioner's tone and attitude, took offense at the nature of the complaints, and the courts obliged them with dismissal, somehow finding this evidence to be probative of "unreasonable" opposition by petitioner, sufficient to strip him of the protections from retaliation afforded by Title VII and §§ 1981 and 1983. Of that limited and faulty evidence, the Appeals Court wrote:

> The record reveals that Cuenca's letters and e-mails to his supervisors contained a large amount of vituperation, impertinence, and criticism of both the University of Kansas administration and colleagues. The discrimination statutes do not confer a license to present grievances in an arrogant and uncivil manner. See *Robbins v. Jefferson County Sch. Dist. R-1*, 186 F.3d 1253, 1259-60 (10th Cir. 1999), abrogated on other grounds by *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Cuenca fails to show that the defendants' stated aversion for the inappropriate tone and presentation of his grievances was a pretext for an intent to retaliate based on his protected activities. (Footnote omitted.)

Order and Judgment of the App. Ct., App. C, p. 73.

By their very nature, complaints of discrimination by an employee against an employer could be subjectively labeled "vituperative" or "impertinent". If courts have the authority to dismiss civil rights cases because plaintiffs express their opposition in direct terms, terms which of course will be offensive to their employers, what good are the statutory protections against retaliation? This appeals court is ruling that if an employee complains directly, that complaint by its very nature is "unreasonable." The court is allowing respon-

dents to defend themselves with "yes, we retaliated against him for his complaints of discrimination, because he deserved it, because he spoke critically of us in those complaints."

Contrast that plaintiff-averse passage and reliance on *Robbins* from this case with the reasoning in the Tenth Circuit's ruling in *Hertz v. Luzenac*, 370 F.3d 1014 (10th Cir. 2004), in which the defense had argued that the jury should be given an "unreasonable opposition" instruction, per *Robbins*, because they characterized the plaintiff's opposition as "intimidating and disruptive" after he screamed loudly enough at his supervisor that other employees heard him:

> It would be ironic, if not absurd, to hold that one loses the protection of an antidiscrimination statute if one gets visibly (or audibly) upset about discriminatory conduct.

Id. That reasoning should be the law of the land, not a stray sensible decision among many irrational decisions. And the comparison shows the conflict even within the Tenth Circuit over this doctrine.

This Court needs to address these questions: Do courts have any authority to strip plaintiffs of the protections from retaliation by determining their opposition to be "unreasonable"? If so, under what circumstances can a complainant's opposition be considered "unreasonable"? Are published criticisms of the employer to be accepted as "unreasonable"? Is political opposition to be accepted as "unreasonable"? Are, in fact, accusations of being a "troublemaker" evidence of adverse employment actions?

Additionally, in cases when a complainant's opposition is subjectively determined to be "unreasonable", what is the effect of that determination on a complainant's other opposition, such as the formal filing of internal and external grievances, EEOC complaints, and lawsuits? Can a complainant's entire case be dismissed

if a court subjectively finds one instance of "unreasonable" opposition? Or is it that only "unreasonable" acts of opposition are unprotected?

Further, shouldn't such a consideration be left to the jury? Because the determination of "reasonable" and "unreasonable" opposition is completely subjective, shouldn't the Courts be barred from such a determination when considering summary dismissal?[10]

III. To settle the issue of whether the courts can require that plaintiffs in civil rights cases prove that an adverse employment action rises to a subjective level of harm to survive summary judgment; whether such a consideration should be limited exclusively to a determination of damages; and whether such a consideration should be left to juries.

In dismissing petitioner's case, the District Court parsed petitioner's claims to rule that no adverse employment action had been adverse enough, relying in part on their earlier decision in *Aquilino v. Univ. of Kan.*, 268 F.3d 930 (10th Cir. 2001)). In *Aquilino,* the Tenth Circuit vacated a jury verdict of liability against these respondents, ruling that the damage done to the plaintiff in that case did not reach a level that justified the District Court having allowed the case to go to trial.

In one particularly confounding passage in this case, the district court wrote off petitioner's claims of adverse employment actions as "speculative" and "conclusory allegations." The District Court wrote:

> Speculative harm does not constitute adverse employment action. *See Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1103-04

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[10] *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (The courts may not make credibility determinations or weigh the evidence.)

> (10th Cir. 1999). Where a plaintiff presents no evidence of adverse action apart from his own conclusory allegations, summary judgment is appropriate. *See Aquilino*, 268 F.3d 930 (finding no adverse action in KU's removal of plaintiff as co-chair of a dissertation committee, denial of ad hoc faculty (volunteer) status, or denial of adjunct research associate position, all after plaintiff had been denied tenure).

Mem. and Order of the District Court, App. A, p. 47. That ruling is particularly absurd in this case, because petitioner had been terminated, which is the ultimate adverse employment action, far from a conclusory allegation, requiring no speculation.

The Tenth Circuit has been relying increasingly on this doctrine to dismiss civil rights cases, many of which were listed in a dissent in *Hillig v. Rumsfeld,* 381 F.3d 1028, n5 (10th Cir. 2004):

> We have applied the "tangible employment action" definition to describe an "adverse employment action" in at least six published and seven unpublished decisions: *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1237-39 (10th Cir. 2004); *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1230 (10th Cir. 2004); *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1174 (10th Cir. 2003); *Wells v. Colorado Dep't Of Transp.*, 325 F.3d 1205, 1213 (10th Cir. 2003); *Aquilino v. Univ. of Kan.*, 268 F.3d 930, 934 (10th Cir. 2001); *Sanchez*, 164 F.3d at 532; *Rennard v. Woodworker's Supply, Inc.*, 101 Fed.Appx. 296, 307 (10th Cir. 2004); *Hill v. Steven Motors, Inc.*, 97 Fed.Appx. 267, 278 (10th Cir. 2004); *McCrary v. Aurora Pub. Schs.*, 57 Fed.Appx. 362, 368 (10th Cir. 2003); *Hinsdale v. City of Liberal, Kan.*, 19 Fed.Appx. 749, 756, n.5 (10th Cir. 2001) (FLSA retaliation claim); *Schmidt v. U.S. West Communications,* 3

> Fed.Appx. 766, 768 (10th Cir. 2001); *Carver v. U.S. Dep't of Interior,* 185 F.3d 873 (10th Circ. 1999) (table); *Trujillo v. New Mexico Dep't of Corrections,* 182 F.3d 933 (10th Cir. 1999) (table).[11]

Id. This *Hillig* case represents an opportunity to see how conflicted the courts' approach is on the subject of the degree of adversity of an adverse employment action. On the one hand, the majority decision recites the Tenth Circuit cases that require a liberal approach to the determination of adversity, allowing for those employment actions that merely "cause harm to future employment prospects" (*Id.*, quoting *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 986-87 (10th Cir. 1996). But then the court changes course and adds another subjective, more strict level of consideration:

> Even though we do not require the plaintiff to show the loss of a specific job, we do not define "adverse employment action" as encompassing every "action taken by a plaintiff's employer . . . that may affect the plaintiff's future employment opportunities . . . ." *Aquilino v. Univ. of Kan.,* 268 F.3d 930, 935 (10th Cir. 2001). We exclude from that definition those acts that merely have a *de minimis* impact upon an employee's future job opportunities. *Id.* at 934.

Id. So, they're arguing that on the one hand, an adverse employment action can be one that merely harms an employee's future employment prospects, but on the other hand, that harm has to be tangible; more than "*de minimis*". But who is to decide what constitutes ac-

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[11] Please note that three of those listed cases are against these respondents. Counting petitioner's case, the number of cases dismissed on behalf of these defendants using this doctrine is at least four. The first of those cases had already been to trial and a jury had returned a verdict of liability. The cases since then have not been allowed to trial.

tual harm and "*de minimis*" harm? Is that not a wholly subjective determination, supposedly out of bounds for courts in considering summary dismissal?

This "tangible employment action" doctrine requires a plaintiff to show an actual effect of an adverse employment action, but even as far back as *Robinson v. Shell Oil Co.*, 519 U.S. 337, 72 FEP 1856 (1997), this Court has accepted even a simple negative job reference as an adverse employment action. One cannot measure the "tangibility" of a negative job reference, nor determine if it may have had only a "de minimis" effect on a plaintiff. It may or may not affect a prospective employer's hiring decision. And that inability to actually prove the effects is common to many adverse employment actions.

In *Desert Palace*, this Court emphasized the phrase "any employment action" from Section 107's wording (*Desert Palace*, at 8). It would seem that the Court meant to make it clear by emphasizing that phrase that Section 107 indeed applies to "any employment practice," and that the decision should abrogate any court's precedent that a plaintiff's claims can be measured for a degree of harm when considering summary dismissal.

No portion of the civil rights statutes specifies "degrees" of harm, such as those found in criminal statutes. Shouldn't any such consideration of "degrees" of harm or the level of adversity of an adverse employment action be left to the determination of damages and not considered in determining liability or summary dismissal? And again, in light of the sanction against the courts making subjective determinations in summary judgment consideration, shouldn't any such de-

termination of the severity of an adverse employment action be left to the jury?[12]

IV. To restore petitioner's Seventh Amendment rights, which have been violated by the lower courts in rulings that are in drastic conflict with established Supreme Court law and Tenth Circuit law.

The District Court decision, affirmed by the Court of Appeals, violated petitioner's Seventh Amendment rights by denying him the right to present his evidence to a jury.

Petitioner presented to the District Court a case that in many instances consisted of textbook examples of long-standing models of discrimination and retaliation (attached as Appendix E). For example, petitioner's immediate supervisor, who had previously been his strongest supporter, who had filed a complaint on behalf of petitioner after a retaliatory negative employment review, then became petitioner's strongest detractor after petitioner filed a formal race discrimination grievance. This supervisor had threatened petitioner with retaliation if he were to file a discrimination complaint and later wrote a front-page editorial in which he connected his displeasure with the petitioner and petitioner's civil rights activism.

In another instance, matching closely the circumstances of the *Price Waterhouse* case, respondents sought external reviews of petitioner's employment record, upon which they relied heavily in their subsequent decisionmaking. In the review letter written by one of these external reviewers, the reviewer clearly stated that he believed petitioner's civil rights activism

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[12] *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (The courts may not make credibility determinations or weigh the evidence.)

to be grounds for denying him further employment. None of the decisionmakers disavowed this statement and respondents later relied on the reviewer's negative assessment in defending their decision.

In yet another instance, which matched exactly the conditions of the *McDonnell Douglas* criterion, petitioner applied for a position with respondents, was deemed qualified, was neither interviewed nor hired, and the position was then left vacant and respondents sought additional candidates.

Petitioner again points out that there is no dispute over the facts of the case. The District Court accepted all of the facts alleged by petitioner. The actions of the respondents that petitioner alleged to be probative of illegal motivation are uncontroverted.

To justify the dismissal of the petitioner's case, then, the District Court and the Appeals Court ruled in conflict with or in disregard of many long-established standards and criterion for summary dismissal in civil rights cases. They parsed petitioner's claims and evidence. They weighed evidence and made subjective determinations. They made determinations about credibility. They rationalized respondents' actions and statements. They colored every aspect of the case with a light favorable to respondents. They made every consequential inference possible for the respondents and none for the petitioner. As did the lower court in the *Reeves* case, the court in this case:

> ...disregarded critical evidence favorable to the petitioner—namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. The court also failed to draw all reasonable inferences in favor of petitioner. (Citations omitted.)

Reeves, 120 S. Ct., at 2111.

As petitioner argued throughout all of his briefs in the District Court and Appeals Court, dismissal of peti-

tioner's case would and did conflict with U.S. Supreme Court decisions regarding the dismissal of employment discrimination cases at summary judgment, including *Desert Palace* (an unlawful employment practice is established through direct or indirect evidence of illegal motive), *Price Waterhouse* (evidence of illegal motive shifts the burden, failure to disavow statements constitutes adoptive admission, employer's legitimate reasons must have motivated it at the time), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (courts may not make credibility determinations or weigh evidence), *Reeves* (evidence of mendacity proves intentional discrimination and pretext, courts may not make credibility determinations or weigh evidence, courts must make all necessary inferences to protect plaintiff from dismissal, courts may not parse plaintiff's evidence and must view the record as a whole), *Hazelwood School Dist. v. United States,* 433 U.S. 299 (1977), (statistics alone are sufficient to establish a prima facie case of racial discrimination), *Teamsters v. United States,* 431 U.S. 324 (1977) (statistics alone are sufficient to establish a prima facie case of racial discrimination), *McDonnell Douglas* (statistics alone are sufficient to prove pretext), *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1991) (plaintiff prevails if defendants cannot articulate a legitimate business reason), and *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990) (universities are not exempt from scrutiny of their employment decisions, including tenure review).

Additionally, petitioner argued throughout the briefs in the District Court and on appeal that dismissal in this case would and did conflict with numerous 10th Circuit decisions regarding summary dismissal, including *Bullington v. United Air Lines, Inc.* 186 F.3d 1301, 1321 (10th Cir. 1999), (plaintiff raises a genuine issue of material fact when decisionmakers have made statements revealing retaliatory motives), *Corneveaux*

v CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996), ("a causal connection is established where the plaintiff presents evidence to raise the inference that her protected activity was the likely reason for the adverse action"), *Danville v. Regional Lab Corp.,* 292 F.3d 1246, 1250 (10th Cir. 2002), (summary dismissal precluded when plaintiff presents evidence—even circumstantial evidence—of discriminatory motive), *McAlester v. United Air Lines,* 851 F.2d 1249 (10th Cir. 1988), (statistical evidence is probative of illegal intent), and *Kenworth v. Conoco, Inc.,* 979 F.2d 1462 (10th Cir. 1992), (a plaintiff is entitled to burden shifting upon "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [discriminatory and/or retaliatory] attitude").

The most egregious and significant conflict in these lower courts' decisions was their disregard of the fundamental instruction that when considering motions for summary dismissal, the courts "must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence", per the *Reeves* and *Anderson* decisions of this Court, and *Trujillo v. University of Colo. Health Sciences Ctr.,* 157 F.3d 1211 (10th Cir. 1998), *Curtis v. Oklahoma City Pub. Sch. Bd. Of Educ.,* 147 F.3d 1200 (10th Cir. 1998), *Penry v. Federal Home Loan Bank of Topeka,* 155 F.3d 1257 (10th Cir. 1998), *Hicks v. Gates Rubber Co.,* 833 F.2d 1406 (10th Cir. 1987), and *Shaw v. Valdez,* 819 F.2d 965 (10th Cir. 1987). This requirement is obviously one of the most basic tenets of summary dismissal law, yet the Appeals Court expressly refused to honor that requirement:

> Cuenca argues that the University of Kansas' failure to disavow Hoy's statements should result in an inference that its decisionmakers took Hoy's comments into account when making their

> decision. *The inferential burden runs the other way, however;* Cuenca had the burden to link the outside reviewer's statement to the decision to deny tenure. (Emphasis added.)[13]

Order and Judgment of the App. Ct., App. C, p. 70.

The decisions of both courts abound with violations of the basic requirement to draw the available inferences to protect petitioner from summary dismissal, including their refusal to infer that the decisionmakers' failure to disavow the statement of illegal animus in petitioner's tenure file was evidence of the decisionmakers' acceptance of that statement; that Gentry's removal of petitioner's books from materials sent to external reviewers was unintentional and that his self-serving explanations of his written lies to the other decisionmakers about petitioner's employment record were actually credible; that petitioner's supervisor wasn't really retaliating against petitioner for filing a race-discrimination complaint, even after he had threatened to do so; that the University's administration's failure to protect petitioner during the several years his grievances were pending was not because they were retaliating against him for speaking out against their policies; and that even though statistical evidence proves the University "underutilizes" minorities, it is not really discriminating against any individuals among them. Throughout the decisions of these lower courts, it is apparent that the courts inserted themselves into the role of the trier of this case, rather than simply assessing the evidence for the existence of

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[13] That ruling is another confounding statement by the Appeals Court, considering that the reviewer's statement to which they refer was in the dossier reviewed by the decisionmakers and relied upon for their decision, it referred to plaintiff's protected activity and recommended denial of tenure, and respondents have since frequently relied upon the reviewers' decisions to justify the denial of tenure.

inferences upon which the eventual fact-finder—the jury—could decide the case in favor of the plaintiff.

Petitioner presented pattern-and-practice evidence and evidence of pretext in the form of statistics, which have previously been ruled probative in Title VII cases by this Court. The Tenth Circuit itself has previously followed this Court's precedent regarding statistics:

> statistics alone may be used to establish a prima facie case of racial discrimination in a disparate treatment case. *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-08, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977); *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 339, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977); *Weahkee v. Norton,* 621 F.2d 1080, 1083 (10th Cir. 1980). The Supreme Court has also held that statistics may be used to prove that the employer's racially neutral reason for termination is purely pretext. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Anderson v. City of Albuquerque,* 690 F.2d 796, 802 (10th Cir. 1982).

McAlester, at 1260.

Petitioner presented evidence of illegal motivation and pattern-and-practice in the form of past actions, citing Rule 406 of the Federal Rules of Evidence:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Petitioner's Rule 406 evidence included uncontroverted evidence from numerous other civil rights lawsuits, rulings from previous cases before the Tenth Circuit in which the court called respondents' conduct into ques-

tion, respondents' failure to keep and maintain federally-mandated employment records, findings from an outside review by the American Association of University Professors that respondents' workplace was wrought with employee rights violations and that "fear, intimidation and retaliation" were "pervasive" in their workplace, and respondents' statistically-verified and OFCCP-noted "underutilization" of minorities.

Petitioner presented evidence of mendacity and spoliation, probative of pretext and illegal intent, which should have precluded summary judgment, per *Reeves*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination...

Reeves, at 2108.

These courts' rulings conflict even with the Tenth Circuit's own precedents on spoliation, set in *Dooley v. Altus Medical Corp.,* 1995 U.S. App. LEXIS 13492 (10th Cir. 1995) (when contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which prevented production did so out of the well-founded fear that the contents would harm him) and *Hicks* (plaintiff "is entitled to the benefit of a presumption that the destroyed documents would have bolstered [his] case").

Petitioner argued that respondents had not presented sufficient, legal reasons for their actions, per *Burdine,* and/or that certain of their actions logically could not be justified by a legal reason. Petitioner argued, for example, that when defendant Gentry withheld petitioner's full record from the decisionmakers and then lied to the decisionmakers about petitioner's record, he

had committed fraud, and that there can be no legitimate business reason for fraud.

Respondents introduced a new reason for their actions in their last dispositive motion brief and in an allowed surreply petitioner pointed out that the Tenth Circuit had previously ruled that changing the reasons for their actions was evidence of pretext in *Tomsic v. State Farm Mutual Auto. Ins.*, 85 F.3d 1472, 1479 (10th Cir. 1996) and *Randle v. City of Aurora*, 69 F.3d 441, 445 (10th Cir. 1995).

The new reason introduced late by respondents was that petitioner had deserved their animus because he had spoken negatively of his colleagues. Petitioner pointed out to the District Court in his surreply that the Tenth Circuit had previously ruled that accusations of being a troublemaker are themselves evidence of pretext, in *Apgar v. Wyoming*, 2000 U.S. App. LEXIS 18633 (10th Cir. 2000).

The District Court ruled and the Appeals Court affirmed that the Courts should not intervene in university tenure cases, even though petitioner pointed out that the case did not resolve on the tenure decision and even though this Court specifically refuted that doctrine in *University of Pennsylvania v. EEOC.*

Both lower courts dissected petitioner's case as if each allegation, statement and incident had occurred in a vacuum, separate and distinct from the rest of the record, as if no two events had been related, as if no two people had influenced each other or acted in concert. However, this Court has ordered the courts to consider all evidence in the context of the complete case, not piecemeal, making it clear that "in the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." *Reeves,* at 2110.

Additionally, the Appeals Court's affirmation disregarded the effect of this Court's *Desert Palace* decision.

Desert Palace was rendered before the Appeals Court issued its decision in this case, as evidenced by the petitioner's citation of it on appeal and the Appeals Court's mention of it in their affirmation. The *Desert Palace* decision made it clear that Section 107 was and had been available to plaintiffs since its enactment in 1991 as a method of establishing illegal employment actions. Petitioner relied on a Section 107/*Price Waterhouse* method of proof, presenting uncontroverted evidence—whether called direct or circumstantial evidence—that illegal reasons motivated respondents actions. The Appeals Court twisted the District Court's disregard of petitioner's Section 107 case into one of a question of whether the evidence was direct or circumstantial. But, as petitioner detailed above, the District Court did not even mention Section 107, nor any requirement specified therein regarding direct evidence, and the Appeals Court was simply guessing at the District Court's reasoning. Additionally, petitioner pointed out to the Appeals Court that even if the evidence of illegal motive were to be ruled circumstantial, the Supreme Court had ruled that such evidence would at least shift the burden, per *Price Waterhouse*, and that even Tenth Circuit law held that evidence to be sufficient to preclude summary judgment, per *Danville*. The Appeals Court was itself bound by *Desert Palace, Price Waterhouse* and *Danville* and should have honored Section 107's authority and the effect of petitioner's evidence of illegal motive.

CONCLUSION

The District Court and the Appeals Court held the petitioner in this case to an unattainable standard for a plaintiff in a civil rights case. The plaintiff in this case proffered written statements and sworn corroboration of illegal motivation that were directly connected to the incidents and actions of the case, as well as statistical

and pattern and practice evidence, fulfilling the evidentiary requirements of Section 107, *Price Waterhouse, Hazelwood, Desert Palace, Reeves,* and other controlling law. The District Court and the Appeals Court either disregarded that evidence or denied its impact or parsed it into innocuous and irrelevant pieces or turned it against petitioner to dismiss all of it as being of no significance whatsoever. Against that standard, no plaintiff could hope to withstand a motion for summary dismissal. For if such evidence is not sufficient to withstand summary judgment, what evidence would be, short of signed affidavits admitting discrimination?

This case represents for this Court an economy of effort with an opportunity to settle in one case several important issues that have dogged plaintiffs in civil rights cases.

This Court should grant certiorari to clarify the impact of its *Desert Palace v. Costa* decision, to settle the issue of "unreasonable" opposition, to settle the issue of whether courts can subjectively determine the degree of damage to a plaintiff in deciding summary dismissal and, above all, to restore this petitioner's Seventh Amendment Constitutional Rights by requiring the District Court to accord requisite weight to petitioner's Section 107 evidence, and his statistical and pattern-and-practice evidence, all of which should have precluded summary dismissal.

Respectfully submitted,

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(785)842-8954

APPENDIX A — Memorandum And Order Of The District Court, Published May 9, 2003.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MICHAEL R. CUENCA,
Plaintiff,

vs. Case No. 98-4180-SAC

UNIVERSITY OF KANSAS,
MYRON A. KAUTSCH,
Individually, and JAMES K.
GENTRY, Individually,
Defendants.

MEMORANDUM AND ORDER

This is a civil rights employment case, filed by an assistant professor whose employment at the University of Kansas has been terminated. It comes before the court on the following motions: plaintiff's motion for summary judgment or partial summary judgment (Dk. 183); defendant's motion for summary judgment (Dk. 192); defendant's motion for leave to substitute corrected memorandum (Dk. 196); defendant's motion to strike plaintiff's affidavit (Dk. 199); and plaintiff's motion for leave to file a surreply (Dk. 208). The court finds it expedient to rule upon the latter three motions before addressing the summary judgment motions.

I. Defendant's motion for leave to substitute corrected memorandum

By this motion, defendant seeks to substitute a corrected memorandum of law in support of its motion for summary judgment. Its original memorandum exceeded this court's page limitation and contained a factual error.[1] Specifically, the original memorandum was

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[1] Defendant contends that the error was a "typographical error" but the reason for the misstatement is immaterial.

two pages over the required maximum, and incorrectly stated that another professor was given a raise in the amount of $180.00, an amount identical to the raise given plaintiff, instead of the correct amount of $650.00.

Plaintiff objects to the substitution, but shows no prejudice in the event the motion is granted. In the interest of having an accurate record and finding no prejudice to plaintiff, the court grants defendant's motion to substitute the corrected memorandum.

II. Plaintiff's motion for leave to file a surreply

Under D. Kan. Rule 7.1(b), parties are permitted to file a dispositivemotion, a response to the motion, and a reply by the movant. The rules do notpermit a surreply. However, the nonmoving party is to be given notice and areasonable opportunity to respond to the movant's summary judgment materials. *See* Fed. R. Civ. P. 56(c). Thus, when a reply advances new reasons or evidence in support of a motion for summary judgment, the nonmoving party is usually granted an opportunity to respond. *See e.g. Stevens v. Deluxe Financial Services, Inc.*, 199 F. Supp. 2d 1128 (D. Kan. 2002).

Plaintiff has sufficiently met this burden by showing that he had no opportunity to address certain subjective reasons asserted by defendant in its response as a justification for plaintiff's treatment. Thus the court will allow plaintiff's short surreply and will consider the arguments presented therein.

III. Defendant's motion to strike plaintiff's affidavit

Defendant requests that the court strike plaintiff's affidavit, or numerous specified paragraphs included therein, because the statements are not within plaintiff's personal knowledge, are conclusory, constitute inadmissible hearsay, or are irrelevant, all in violation of the governing rules. *See* Fed.R.Civ.P. 56(e); D. Kan. R.

7.6; 56.1. Plaintiff counters that the sole grounds for striking an affidavit is when it contradicts one's prior sworn testimony, creating a sham issue of fact, pursuant to *Franks v. Nimmo*, 796 F.2d 1230 (10th Cir. 1986). Plaintiff's assertion is incorrect, as motions to strike are both proper and frequently made on other grounds. *See e.g., Noblett v. General Electric Credit Corp.*, 400 F.2d 442, 445 (10th Cir.), *cert. denied*, 393 U.S. 935 (1968) (affirming a motion to strike an affidavit for violation of Rule 56(e)). Defendant's motion to strike plaintiff's affidavit for violation of Rule 56(e) is not improper.

Plaintiff's affidavit forms the sole support for his asserted facts in opposition to defendant's summary judgment motion and in support of his own summary judgment motion. This affidavit (Dk. 185 - 191) consists not only of 248 separate paragraphs, many of which contain multiple sentences, but also of seven attachments, one of which (Appendix B) contains 169 other exhibits, totaling 645 pages. The affidavit and its attachments are voluminous.

Because of the size of the affidavit and its attachments, the task of deciding the motion to strike on its merits would take nearly as much of the court's resources as would deciding the parties' substantive motions. Further, granting defendant's motion to strike plaintiff's affidavit *in toto* would have the effect of granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment. The court declines to strike plaintiff's affidavit in its entirety.

Defendant also requests that the court strike the offending paragraphs thereof. The court grants this motion, and will disregard the inadmissible portions of the challenged affidavit, *i.e.*, all statements that do not comply with Rule 56(e). *See Lee v. National Life Assur-*

ance Co. of Canada, 632 F.2d 524, 529 (5th Cir. 1980). Thus defendant's motion to strike defendant's affidavit is denied in part and granted in part.

IV. Motions for summary judgment

Many of the issues raised in defendant's motion for summary judgment are identical to those in plaintiff's motion for summary judgment. To the extent separate issues are raised, they will be addressed separately.

A. Summary Judgment Standards

A court grants a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure if a genuine issue of material fact does not exist and if the movant is entitled to judgment as a matter of law. The court is to determine "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will ... preclude summary judgment." *Id.* There are no genuine issues for trial if the record taken as a whole would not persuade a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The initial burden is with the movant to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir.), *cert. denied*, 506 U.S. 1013 (1992). If this burden is met, the nonmovant must "come forward with specific facts showing that there is a genuine issue for trial as to elements essential to" the nonmovant's claim or position. *Martin v. Nannie and Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993) (citations omitted). The

nonmovant's burden is more than a simple showing of "some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586; it requires "'present[ing] sufficient evidence in specific, factual form for a jury to return a verdict in that party's favor.'" *Thomas v. International Business Machines*, 48 F.3d 478, 484 (10th Cir. 1995) (quoting *Bacchus Industries, Inc. v. Arvin Industries, Inc.*, 939 F.2d 887, 891 (10th Cir. 1991)).

The court views the evidence of record and draws all reasonable inferences in the light most favorable to the nonmovant. *Id.* At the same time, a party relying on only conclusory allegations cannot defeat a properly supported motion for summary judgment. *White v. York Intern. Corp.*, 45 F.3d 357, 363 (10th Cir. 1995). "[I]t is not enough that the nonmovant's evidence be merely colorable or anything short of significantly probative." *Revell v. Hoffman*, 309 F.3d 1228, 1231 (10th Cir. 2002) (citations and quotations omitted).

B. Statement of Uncontroverted Facts

Plaintiff was first hired at Kansas University (KU) on August 16, 1994, as an Assistant Professor of Visual Communications in the School of Journalism ("the J-School"). Plaintiff's birth certificate states his father's race as "Filipino." (PTO, p. 21.) At the time plaintiff was hired, the Dean of the J-School was Myron A. Kautsch, a defendant in this case.

Plaintiff was employed as a tenure-track professor. His general employment responsibilities included teaching, researching or engaging in creative activity related to design and multi-media technology, and performing service to the J-School, KU and the academic profession.

In the fall of 1994, plaintiff was assigned to teach two courses, even though the J-School expected faculty to teach three courses a semester. In 1995, plaintiff was again assigned to teach two classes, but volunteered to

teach a third class. Plaintiff regretted that decision because of the work load demanded by the courses, and the number of students involved.

In June of 1995, Kautsch gave plaintiff his annual evaluation for 1994. Plaintiff received a rating of "good." During the fall of 1995, plaintiff sent three letters complaining of his teaching load to several individuals. On December 7, 1995, plaintiff wrote a self-evaluation, at the request of Kautsch, outlining his performance as a faculty member to date, expressing his anger, and criticizing the J-School administration for not recognizing his record of accomplishments. Kautsch responded soon thereafter to plaintiff's concerns regarding his teaching load, and plaintiff sent Kautsch a note thanking Kautsch for his patience in dealing with plaintiff.

Based on plaintiff's demands and the J-School's inability to meet them, Kautsch considered sending a notice of non-reappointment to plaintiff in 1995. On December 18, 1995, Kautsch responded to plaintiff's self-evaluation by a detailed written letter, and on that same date notified plaintiff that although he was not being given notice of non-reappointment for the end of 1995-1996, he was "on notice to expect non-renewal of [his] appointment at the end of the 1996-1997 academic year," unless certain stated terms relating to performance were met, and he was subject to performance evaluation by the J-School. DE 54.

Other letters were exchanged between Kautsch and plaintiff regarding plaintiff's objections and concerns about his position, and plaintiff's teaching load was adjusted as plaintiff had requested for the spring 1996 semester.

In March of 1996, Kautsch informed the faculty that unclassified employee Gary Hawke's position as General Manager of the student operated radio station

would be changed from a nine-month position to a twelve-month position, would be renamed "Integrated Media Lab General Manager," and would be given the added responsibilities of supervisor of all media labs within the J-School. This position was not a faculty position or a tenure-track position, and neither plaintiff nor others were given the opportunity to apply for it.

In May of 1996, Kautsch gave plaintiff his annual evaluation for 1995, which rated plaintiff "poor to adequate," and awarded plaintiff a merit increase of $180. At that same time Kautsch gave a white male in the J-School, Paul Wenske, a rating of "adequate," and awarded him a merit increase of $650. Kautsch considered non-renewing both plaintiff and Wenske. In June of 1996, plaintiff sent Kautsch a letter objecting to his evaluation, asking for an explanation of it, and stating his intent to appeal.

Later that summer, Kautsch advised Provost David Schulenburger that he was resigning his position as Dean of the J-School. The Provost accepted Kautsch's resignation and acknowledged that Kautsch would continue as Dean of the J-School during the 1996-97 academic year while a national search was conducted for a new dean.

Sometime during the fall semester of 1996, plaintiff began actively participating as a member and/or leader of various civil rights groups.

In October of 1996, Kautsch sent plaintiff an explanation of his evaluation. Kautsch maintained plaintiff's rating of "poor to adequate," but gave plaintiff $320 salary in addition to the $180 plaintiff had previously been awarded. Although Kautsch did not forward the document to plaintiff, Kautsch had conducted a lengthy and detailed reconsideration of plaintiff's 1995 performance evaluation.

On some unspecified date prior to February 19, 1997, plaintiff met with Maurice Bryan, KU's Director of Equal Opportunity, to discuss his concerns about Kautsch. On February 19, 1997, plaintiff wrote a letter to Bryan, stating in part: "I am filing a discrimination complaint with the Kansas Human Rights Commission against the School of Journalism and the University, based on my mistreatment since my employment in August of 1994." The letter did not state whether plaintiff's complaint had been filed, or if so, whether it alleged race discrimination, retaliation, or some other basis, but it stated that it enclosed copies of portions of the complaint.

On March 17, 1997, Bryan sent Kautsch a copy of plaintiff's "racial discrimination complaint," requested Kautsch's response, and stated Bryan's intent to conduct an investigation of plaintiff's complaints. Kautsch responded at the end of the month, and Bryan acknowledged his receipt thereof, stating in part: "normally, when we have an external complaint we let that process play itself out. However, at this point, I still wish to see if we can resolve this in-house." DE 135. On or about April of 1997, plaintiff filed complaints with the EEOC and KHRC,[2] charging KU with racial discrimination and retaliation. (PTO stipulation, p. 21.)

By letter dated June 3, 1997, Bryan advised Kautsch that he had "confirmation of the mediation phase of the Kansas Human Rights Commission, and since that

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[2] No KHRC complaint is included in the record. It appears from statements in the briefs that plaintiff may have originally complained of race discrimination and/or retaliation, then later amended his complaint to include national origin discrimination. For ease of reference, the court will refer to plaintiff's discrimination claim(s) as race discrimination, rather than as national origin discrimination, the analysis of the two being the same.

phase is very similar to our initial process, I have decided to suspend" any internal efforts to resolve plaintiff's discrimination complaint. DE 136. The internal investigation at KU was not thereafter reopened.

In July of 1997, James K. Gentry, a defendant in this case, became the new Dean of the J-School, and soon thereafter responded to a note by plaintiff, confirming that he was aware of plaintiff's discrimination complaint.

That same month, Gentry notified the J-School faculty of funding for a position of New Media Leader. The day plaintiff received such notice, he responded that he believed he had been hired to fill such a role. Gentry replied that he had not been informed of such, but that plaintiff was welcome to apply for the position. Gentry did not believe that plaintiff's position was the same as described for the New Media Leader position.

Gentry told plaintiff that he would be "creating a search committee, position description, etc., as with all university searches," to conduct an outside search for a New Media Leader, and began advertising in August of 1997. Plaintiff applied for the position. Bryan reviewed his paperwork and determined that plaintiff was qualified for the position, and so informed Gentry. Plaintiff was found to be a qualified candidate but did not receive an interview. All other qualified candidates, hree white males, received interviews. *See* pl. exh. B, p. 262, Exh. 77. None of those persons was selected for the position, and the search for a New Media Leader was closed without the position having been filled.

In October of 1998, plaintiff filed suit in this case, alleging race-based discrimination and retaliation against KU, Kautsch and Gentry.

In 1998, plaintiff's record was given a pre-tenure review by the JSchool's Promotion and Tenure Committee ("Tenure Committee"), as was the record of a white

male colleague. On January 23, 1999, Gentry provided plaintiff a memorandum relating to that review, noting that the school committee's pre-tenure review process was new, and "should in no way be construed as having the weight of a formal pre-tenure review." DE 155. It noted several areas where plaintiff could strengthen his record in anticipation of the promotion and tenure process.

In February of 1999, Ted Fredrickson, Chairman of the News and Information faculty at the J-School, and plaintiff exchanged several e-mails. One contains plaintiff's statement, "You once warned me that playing the race card in this workplace would cost me." Fredrickson's e-mail in response stated, "that line about me supposedly warning you that it would cost you dearly to play the race card is fiction. What I DID tell you, and what I still believe to be true, was that to my knowledge, race was never a factor in how you were treated in the School of Journalism by Mike Kautsch or anyone else. And I say that as someone who disagreed in a very public way with how you (and Paul Wenske and others) were treated by the previous administration in this school." DE 186. Plaintiff replied that Fredrickson's exact words were: " If you ever use race as an issue in this, you'll lose what little support you have here."

In April of 1999, Gentry advised plaintiff that he would be going through the promotion and tenure process in the 1999-2000 academic year and provided plaintiff a timeline for that process. Plaintiff was aware of the J-School's standards for promotion and tenure.

Plaintiff gave Gentry a draft of his record, using the "Blue Form," and included the names of four individuals plaintiff recommended as external reviewers, one of whom was Mr. Hoy. Gentry sent a selection of plaintiff's materials to selected external reviewers, two of whom had been proposed by plaintiff, but Gentry failed

to send copies of the book chapters plaintiff had written. When this omission was brought to Gentry's attention, he sent the book chapters to the external reviewers, with a follow-up letter. Although some reviewers had sent their evaluations to Kautsch before receiving and reviewing plaintiff's book chapters, Kautsch asked each of them whether the book chapters affected their evaluation, and each replied negatively. Def's Exh. M, Bates # 30736.

On December 14, 1999, the J-School's committee on promotion and tenure notified plaintiff that they had "voted overwhelmingly to deny" his tenure and promotion because his teaching, research/ creative performance, and service were not deemed sufficient. Possible ratings for performance in each of those categories were: exceptional, very good, good, adequate, and poor. The committee rated plaintiff's teaching as good, his research and creative performance as poor, and his service as poor. DE 167. The letter states, among other matters, that the decision was based solely on plaintiff's performance as an assistant professor.

Gentry concurred with the J-School's committee's 12-2[3] recommendation not to extend tenure or promotion to plaintiff, and, pursuant to plaintiff's request, plaintiff's materials were forwarded on December 27, 1999, to the University Committee on Promotion and Tenure. A cover letter by the chair of the J-School's committee on promotion and tenure to the University Committee on Promotion and Tenure specified plaintiff's failings. DE O.

On February 25, 2000, KU's student newspaper published a statement from Journalism Professor

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[3] One exhibit shows that the recommendation was 12-2, but another represents it as 12-1.

Frederickson, the chairman of the news and information sequence, which referred to plaintiff.

After conducting a review of plaintiff's materials, the University Committee on Promotion and Tenure notified plaintiff by letter dated March 26, 2000, that he had not been recommended for promotion and tenure by that committee, and that his appointment for 2000-2001 would be a terminal appointment. Plaintiff was one of eight individuals not recommended for promotion and tenure at KU at that time.

On March 29, 2000, plaintiff received a sanction of warning from the Provost for an "egregious" failure to meet his academic responsibilities, related to his cancellation of certain classes. DE 246. During the first eight weeks of that spring semester, plaintiff had missed 31% of his classes in one course, and 37.5% of his classes in another course for the stated reason that he was attending another professor's employment discrimination trial in federal court, which he encouraged his students to attend as well.

In April of 2000, plaintiff filed a complaint of discrimination regarding his denial of tenure with Bryan, KU's Director of Equal Opportunity, but was told that jurisdiction over promotion and tenure decisions resided with KU's Committee on Tenure and Related Problems. In or about August of 2000, plaintiff filed a second complaint with the KHRC/EEOC alleging national origin-based discrimination and retaliation against KU.

In September of 2000, plaintiff requested a second review for promotion and tenure and that his notice of terminal appointment be rescinded. Plaintiff then went through the promotion and tenure peer review process a second time during the 2000-2001 academic year, but was subsequently informed that he had not been recommended for tenure and promotion and that his ter-

minal appointment for that academic year would not be rescinded. Plaintiff's appeal of that decision was denied.

C. Analysis and Authorities

1. Timeliness

The court first considers defendant's contention that plaintiff's claims based on acts which occurred prior to June 8, 1996, are untimely because they occurred more than 300 days before plaintiff first filed his KHRC claim. Plaintiff counters that all claims are timely because of the continuing violation doctrine. Given the surprising absence in the record of copies of plaintiff's KHRC claims or other specific evidence showing which claims were made on which dates, coupled with recent changes in the law, *see Boyler v. Cordant Technologies, Inc.*, 316 F.3d 1137, 1139-40 (10th Cir. 2003), the court declines to base its ruling upon this theory, preferring to examine the merits of the claims.

2. Evidentiary issues

Before the court examines the merits of the motions, it will first examine certain legal and evidentiary issues raised by the pleadings and their attachments.

Direct Evidence

Although the court will not address each legal error in plaintiff's briefs, it must briefly address plaintiff's erroneous assertion that this case should be controlled by a direct evidence analysis. "Direct evidence demonstrates on its face that the employment decision was reached for discriminatory reasons." *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1249 (10th Cir. 2002). "Direct evidence is that "which if believed, proves the existence of a fact in issue without inference or presumption." *Kerr v. Valdez*, 55 Fed. Appx. 491, 494-95, 2002 WL 31895062, *3 (10th Cir. 2002), quoting *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) (further quotation omitted); *see Bedell*

v. American Yearbook Co., Inc. 17 F. Supp. 2d 1227, 1230 -31 (D. Kan. 1998).

Direct evidence is rarely present in a discrimination case. *Daniel v. Loveridge*, 32 F.3d 1472, 1476 (10th Cir.1994). To constitute direct evidence, the evidence must be from the decision-maker, must relate directly to the adverse action at issue, and must contain an acknowledgment of discriminatory intent or reveal a propensity to make decisions based on unlawful criteria. *See Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014, 1024 (E.D. Wis. 2002) (citing cases); *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000); *Chatfield v. Shilling Const. Co., Inc.*, 232 F.3d 900, 2000 WL 1531846, *2 (10th Cir. 2000). For example, direct evidence is found where a letter of demotion from the decision maker states that because plaintiff is "a member of the World Church of the Creator, a White supremacist political organization ... employees cannot have confidence in the objectivity of [his] training, evaluation, or supervision when [he] must compare Whites to non-Whites." *Peterson*, 205 F. Supp. at 1024.

In this case, plaintiff has not identified any document or statement directly linking any adverse action to his race. Direct evidence of prohibited discrimination or retaliation in the decisions affecting plaintiff is not found in Hoy's statement as an outside reviewer in 1999, Kautsch's statements in 1995, Frederickson's newspaper statements in 2000, Gentry's failure to forward plaintiff's book chapters to outside reviewers, or in any other evidence of record. Accordingly, plaintiff's claims must be proved, if at all, by indirect evidence.

Statistics

The court also initially addresses certain statistical evidence proposed by plaintiff, which the court discounts. Plaintiff shows the court various statistics in an

attempt to show a pattern and practice of racial discrimination at KU. It is true that, "statistics alone may be used to establish a prima facie case of racial discrimination in a disparate treatment case," *McAlester v. United Air Lines, Inc.* 851 F.2d 1249, 1258 (10th Cir. 1988), citing cases. Plaintiff makes no attempt, however, to show the statistical comparison of the percentage of minorities terminated with their percentage in the work force of KU, or within the J-School. Plaintiff refers to the poor retention rate of minorities, apparently at KU, but those statistics apparently include those who leave for reasons other than termination. Plaintiff compares the small percentage of Hispanics in KU's faculty to the percentage of Hispanics in Kansas, instead of to those Hispanics qualified to serve on KU's faculty.

Plaintiff's statistics fail to show the number of individuals of plaintiff's race, if any, who were denied tenure by the J-School or the number of ethnic minorities in general that have applied for tenure with KU. *See Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 979 (10th Cir. 1996) ("While statistical evidence may create an inference of discrimination, the evidence may be so flawed as to render it insufficient to raise a jury question."). In short, plaintiff's irrelevant comparisons preclude any effective use of the offered statistics.

OFCCP

The court similarly discounts plaintiff's proposed evidence of KU's non-compliance with the Office of Federal Contract Compliance Programs ("OFCCP"). The parties stipulated in the pretrial order that during 1995, KU was found to be out-of-compliance with Executive Order 11246 by the OFCCP. Plaintiff submits some evidence relating to this violation in support of his pattern and practice allegations. *See* plaintiff's App. B, Exh. 132 (referencing three violations: failing to

submit a summary of the results of KU's prior year affirmative action placement; inadequate record keeping in applicant flow, hiring and promotion personnel activity data; and, inadequate identification of problem area of underutilization of minorities and females). After reviewing the exhibits, the court cannot determine whether KU's 1995 lack of compliance was due even in part to substantive violations, or whether it was instead due only to procedural failings in KU's manner of reporting or record keeping. Accordingly, the relevance of this evidence has not been shown.

3. Legal Standards

McDonnell Douglas framework

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) provides the framework for analyzing circumstantial evidence under Title VII, as well as § 1981 claims and § 1983 claims based on allegations of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Kendrick v. Penske Transp. Svc.*, 220 F.3d 1220, 1226 & n. 4 (10th Cir.2000); *See Perry v. Woodward*, 199 F.3d 1126, 1135 (10th Cir. 1999).

> Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of wrongful termination, by showing that: "(1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge." *Id.* at 1135. Upon such a showing, a rebuttable presumption arises that her discharge was motivated by unlawful discrimination. The burden then shifts to the employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the termination. Thereafter, the burden reverts to the plaintiff, who may avoid summary

judgment only by showing that a factual dispute exists whether the employer's articulated reason was pretextual. *See id.*

Chatfield v. Shilling Const. Co., Inc., 232 F.3d 900, 2000 WL 1531846, *2 (10th Cir. 2000).

Failure to promote - race

To carry the initial burden of establishing a prima facie case of race discrimination for a failure to promote claim, the plaintiff must typically show that he or she (1) belongs to a minority group; (2) was qualified for the promotion; (3) sought but did not receive the promotion; and (4)the position was filled with a non-minority or remained available following the decision not to promote him. *See EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n. 6 (10th Cir. 2000); *Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000).

Defendants "concede that plaintiff is a member of a protected class." (Dk. 196, corrected memo, p. 21.) This concession is coupled with the absence in the record of any claim that defendants lacked knowledge of plaintiff's minority status at the time of the events giving rise to this action. Viewed in the light most favorable to plaintiff, defendants knew of plaintiff's minority status at all times relevant to this case.

Retaliation Claim.

Title VII makes it an unlawful employment practice "for an employer to discriminate against any of his employees ... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Section 2000e-2(a) lists actions that can constitute discrimination, specifying a refusal to hire, a discharge, or any discriminatory treatment with respect to "compensation, terms, conditions, or privileges of employment." The three-pronged burden-shifting analysis set forth in *McDon-*

nell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), applies to plaintiff's claims. In the absence of direct evidence, a prima facie case of retaliation requires a plaintiff to show that (1) he engaged in protected opposition to discrimination; (2) he was subjected to adverse employment action by the employer; and (3) a causal connection exists between the protected activity and the adverse action. *See McCue v. Kansas, Dep't. of Human Resources*, 165 F.3d 784, 789 (10th Cir. 1999). "If a prima facie case is established, the burden of production shifts, and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse action." *Purrington v. University of Utah*, 996 F.2d 1025, 1033 (10th Cir. 1993). If the employer offers such a reason, the plaintiff may survive summary judgment by showing that there is a genuine dispute of material fact as to whether the proffered reason for the challenged action is pretextual. *See Richmond*, 120 F.3d at 208.

Trujillo v. New Mexico Dept. of Corrections, 182 F.3d 933, 1999 WL 194151, *2 (10th Cir. 1999). The absence of a reference to unlawful discrimination "can preclude a retaliation claim because an employer cannot engage in unlawful retaliation if it does not know that the employee has opposed or is opposing a violation of Title VII." *Petersen v. Utah Dept. of Corrections,* 301 F.3d 1182, 1188 (10th Cir. 2002).

Retaliation based on opposition to discrimination

Opposition to an employer's conduct is protected by § 2000e-3(a) only if it is opposition to a "practice made an unlawful employment practice by [Title VII]." Opposition could be protected even if a person were wrong about whether another had in fact engaged in a violation of Title VII; it would be enough if he had a "good faith belief that Title VII ha[d] been violated." *Love v.*

Re/Max of Am., Inc., 738 F.2d 383, 385 (10th Cir. 1984).) *Petersen*, 301 F.3d at 118.

Adverse Employment Action

Conduct is adverse employment action if it "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998).

Traditionally, the Tenth Circuit has not required that adverse action be material, and has not limited that term to mean only monetary losses in the form of wages or benefits. *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998). Recent Tenth Circuit cases seem to have adopted a materiality requirement, however, in stating:

"Although the Tenth Circuit liberally defines an 'adverse employment action,' its existence is determined on a case by case basis and does not extend to a mere inconvenience or an alteration of job responsibilities." *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857 (10th Cir. 2000) (internal quotation marks and citation omitted). The employer's retaliation must be "materially adverse employment action." *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 533 (10th Cir. 1998).

Petersen, 301 F.3d at 1189; *see also Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1232 (10th Cir. 2000) (finding evidence sufficient to demonstrate that the adverse employment action was "significant, material, and tangible.")

The Tenth Circuit recently held that an involuntary lateral transfer, without more, does not constitute an "adverse employment action" where the transfer merely increased the employee's commute and did not alter her salary, benefits, or teaching responsibilities,

and the transfer was prompted by decreasing student enrollment. *See Sanchez*, 164 F.3d at 532. Similarly, the Tenth Circuit found as a matter of law that plaintiff's removal from the graduate faculty and student dissertation committee did not constitute adverse employment actions where the University's actions had a de minimus effect on plaintiff's future employment opportunities, were normal incidents of the denial of tenure and merely altered her job responsibilities in the last months of her employment. *See Aquilino v. Univ. of Kan.*, 268 F.3d 930 (10th Cir. 2001). *See generally Meiners v. University of Kansas*, 239 F. Supp. 2d 1175, 1191 (D. Kan. 2002).

Speculative harm does not constitute adverse employment action. *See Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1103-04 (10th Cir. 1999). Where a plaintiff presents no evidence of adverse action apart from his own conclusory allegations, summary judgment is appropriate. *See Aquilino*, 268 F.3d 930 (finding no adverse action in KU's removal of plaintiff as co-chair of a dissertation committee, denial of ad hoc faculty (volunteer) status, or denial of adjunct research associate position, all after plaintiff had been denied tenure).

4. Race Discrimination/Retaliation in Terms and Conditions, Failures to Transfer

Viewed in the light most favorable to plaintiff, plaintiff's letter to Bryan dated February 19, 1997, was the first notice defendant had of plaintiff's complaint of race discrimination and/or retaliation. Although plaintiff had complained previously of disparate treatment, such complaints reflected dissatisfaction with plaintiff's teaching load, and have not been shown to have related to plaintiff's race or protected conduct. Although plaintiff participated in various civil rights groups in and after 1996, even assuming plaintiff's association with

such groups constitutes protected conduct, no evidence as to defendant's knowledge of that conduct prior to February of 1997 has been shown.

The court further finds that many of the events of which plaintiff complains are insufficient to constitute the requisite adverse action, regardless of any materiality requirement.

Threat to Terminate / Special review

Kautsch considered non-reappointing plaintiff in December of 1995. *See* Pl. App. B, Exh. 168. This did not significantly affect plaintiff's employment status or benefits, however, because Kautsch did reappoint plaintiff at that time. *See Id.* The same is true for Kautsch's "threat" to place plaintiff on a special review. Although that action was contemplated, *see* Pl. App. B., Exh. 196, plaintiff has failed to show that it was ever undertaken. "'Unsubstantiated oral reprimands' and 'unnecessary derogatory comments' " such as those alleged here are not included within the definition of adverse action absent evidence that they had some impact on the employee's employment status." *Sanchez* , 164 F.3d at 533. Plaintiff's assertion that this special review required him to keep his mouth shut about any of his employment concerns, under threat of termination, (Pl. App. B), is unsupported by the record.

Discipline for failing to conduct classes

On March 29, 2000, plaintiff received a sanction of warning from the Provost for an "egregious" failure to meet his academic responsibilities, related to his cancellation of certain classes. DE 246. During the first eight weeks of that spring semester, plaintiff had missed 31% of his classes in one course, and 37.5% of his classes in another course, for the stated reason that he was attending another professor's employment discrimination trial in federal court. Plaintiff does not contend that the contents of the letter are untrue, but

complains that the sanction was motivated by illegal animus, and constitutes disparate treatment because Kautsch and Gentry were not disciplined for their alleged violations of KU's code of conduct.

This letter did not effect a significant change in plaintiff's employment status or benefits, and was merely a warning. No evidence has been shown that this letter of reprimand had any negative effect on his employment, or was considered by anyone in preparing plaintiff's evaluation or deciding on his promotion and tenure. Thus no reasonable jury could conclude that this written reprimand is sufficient to constitute an adverse action. *Cf. Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) (written warnings constituted adverse actions where evidence demonstrated that the more warnings an employee received, the more likely he or she was to be terminated for a further infraction).

Further, plaintiff has neither shown that either Kautsch or Gentry violated KU's faculty code of conduct, as alleged, nor shown that such violations, if any, were of comparable seriousness to plaintiff's repeated failure to conduct class to warrant a similar sanction. Thus plaintiff has not shown that he was treated any differently than his comparators.

Suspension of internal investigation

The decision to suspend KU's internal investigation of plaintiff's complaints of race discrimination and/ or retaliation was not made by Kautsch or anyone involved in the decisions relative to plaintiff's employment who are the particular targets of plaintiff's speculations of a retaliatory animus. Instead, the investigation was initiated and, several months thereafter, suspended by Bryan, KU's Director of Equal Opportunity. It is uncontroverted that Bryan made this decision because he had confirmation of the mediation phase of the KHRC, which phase is substantially simi-

lar to KU's initial process. This is not, as plaintiff asserts, the same as suspending the internal investigation because of "failed mediation." The record shows that Bryan suspended the internal investigation because internal efforts had been unfruitful, because he believed that further efforts would be futile, and because KU would participate in the KHRC process. *See* Dk. 186, plaintiff's App. B, p. 206-211. KHRC's investigation was not impeded and proceeded to a conclusion, although one unfavorable to plaintiff.[4]

Plaintiff has shown no adverse action in KU's decision not to conduct a parallel investigation. *See Dean v. The Boeing Co.*, 195 F. Supp. 2d 1280 (D. Kan. 2002)(alleged failure to investigate internal racial discrimination complaint was not actionable because it did not constitute substantial adverse employment action, as required to support a Title VII retaliation claim.), *aff'd* 2003 WL 1439623 (10th Cir. 2003). Nor has plaintiff shown that had KU conducted an internal investigation, its conclusion would have been any different than the 'no probable cause' finding reached by the KHRC.

Exclusion from meetings

Plaintiff contends that defendant Gentry took adverse action against him by excluding him from important meetings. Plaintiff contends that Gentry did so by either not informing him of such meetings, or by scheduling them at times plaintiff could not attend. Plaintiff's lack of specificity on this claim prevents the court from much analysis thereof. The court finds that plaintiff has failed to show that Gentry's acts of excluding plaintiff from meetings, if any, were motivated by plaintiff's race or protected conduct, and has failed

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[4] On June 11, 1998, the KHRC issued a "No Probable Cause" finding on plaintiff's complaint.

to show that such exclusions were significant enough to constitute adverse action.

Integrated Media Lab General Manager

The court next addresses defendant's failure to consider plaintiff for the position of "Integrated Media Lab General Manager" in March of 1996. It is uncontested that this position was not a faculty or tenure track position. To view that position as a promotion for plaintiff, or even as a lateral transfer from the faculty, tenure-track position plaintiff already held, would turn academia upside down. The court thus considers this as a failure to demote claim, which under these circumstances, is not actionable under Title VII. Alternatively, plaintiff has not shown that he was qualified for that position.

Plaintiff's claim of retaliation based upon this event also fails. Failing to consider plaintiff for a demotion does not constitute adverse employment action, and defendant's non-consideration of defendant for the position of "Integrated Media Lab General Manager" has not been shown to be adverse to plaintiff in any way. The fact that the plaintiff views the transfer positively does not of itself render the denial of the transfer adverse employment action. *See, e.g., Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1449-50 (11th Cir. 1998) (collecting cases). Additionally, this event occurred approximately eleven months before plaintiff's protected conduct, precluding the requisite causal connection.

May 1996 pay raise/evaluation

Plaintiff correctly contends that in May of 1996, Kautsch gave him the lowest salary increase of any other tenure-track faculty member in the J-School, and a low evaluation. Plaintiff contends this evidences racial discrimination and retaliation.

Plaintiff is correct that his evaluation was lower than any other tenuretrack faculty member. Plaintiff has not shown, however, that anyone who received an identical rating on his or her evaluation received a higher raise than he did. Plaintiff has shown only that his salary increase is less than plaintiff desired and less than that awarded to others who received better evaluations. Because he has not shown that he was treated differently than any comparator, plaintiff fails to make a prima facie case of race discrimination either in his low evaluation, or in the correspondingly low amount of raise he received.

Similarly, plaintiff fails to make a prima facie case of retaliation because this evaluation occurred before plaintiff's protected activity, preventing the requisite causal connection, and because receipt of a raise, although minimal in amount, has not been shown to constitute adverse action.

New Media Leader

Plaintiff has shown that he applied for an available position of new media leader in October of 1997, and was found to meet the stated qualifications for that position, as were three white males. The three white males were interviewed, but defendant was not, purportedly because the white males were better qualified. Plaintiff thus meets the first three elements of a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802 (enumerating the following elements required in order for a plaintiff to establish a prima facie case in the failure to hire context: (1) plaintiff belongs to a protected class; (2) plaintiff "applied and was qualified for a job for which the employer was seeking applicants"; (3) despite being qualified, the plaintiff was rejected; and (4) after plaintiff's rejection, "the position remained open and the employer continued to

seek applicants from persons of [plaintiff's] qualifications."

Defendant alleges solely that the plaintiff has failed to meet the fourth element, above. Defendant has presented uncontradicted evidence that no one was hired to fill the position of new media leader, although interviews were conducted. Plaintiff does not allege that the position remained open or that the defendant continued to seek applicants for that position, choosing instead to dispute the legal requirement imposed by the fourth element. Because of plaintiff's failure to meet the fourth element, plaintiff fails to make a prima facie case of race discrimination.

Plaintiff's claim of retaliation meets the same fate. Plaintiff has failed to show that he suffered any adverse action in not receiving this position, as it was a temporary, two-year, non-tenure track appointment. Additionally, because this event occurred approximately eight months after plaintiff's protected conduct, it lacks the close temporal proximity necessary to show a causal connection, in the absence of other factors.

In short, plaintiff's claims of discriminatory or retaliatory terms and conditions of employment and of failure to transfer or promote, as addressed above, fail to raise a material question of fact. The court separately addresses plaintiff's claims relating to his denial of promotion and tenure, below.

5. Denial of Promotion and Tenure

A plaintiff's own conclusory opinions about his qualifications and another's racial animus do not give rise to a material factual dispute. *See Bullington v. United Airlines*, 186 F.3d 1301, 1318 (10th Cir.1999). Evidence that one's qualifications for tenure, such as his research, were unfairly judged, coupled with the plaintiff's own opinions about his qualifications do not give rise to a material factual dispute. *See Babbar v. Ebadi*,

216 F.3d 1086, 2000 WL 702428, *6 (10th Cir. 2000) (Table).

The relevant inquiry in a Title VII discrimination action is not whether KU's "proffered reasons were wise, fair or correct," but whether KU "honestly believed those reasons and acted in good faith on that belief." *Bullington*, 186 F.3d at 1318 (citing *Sanchez v. Phillip Morris, Inc.*, 992 F.2d 244, 247 (10th Cir. 1993)).

> Federal courts are not particularly well-suited to the task of evaluating the criteria for successful tenured professors and are particularly ill-suited to determine the best candidates. *See id.* at 1318 n. 14. "We previously have recognized that ... when analyzing the pretext issue, [we] do not sit as 'super-personnel departments' free to second-guess the business judgment of an employer." *Id.* (quoting *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir.), *cert. denied*, 120 S. Ct. 53 (1999)).

Babbar, 216 F.3d 1086, 2000 WL 702428, at *6.

Plaintiff was denied tenure because he did not receive the requisite number of votes from members of the relevant committees on Tenure and 35 Promotion. The majority of internal reviewers and external reviewers did not view plaintiff's record favorably. Although no single reason or set of reasons can be provided as to why the committees voted as they did, in general they determined, based on all of the materials provided to them, that the breadth and depth of the plaintiff's research, creative performance, and service, considered in conjunction with the quality of his teaching, did not, in their best judgment, warrant an award of tenure. Plaintiff fails to show the court that any individual granted promotion and tenure was similarly situated, was held to a different standard, was significantly less qualified than plaintiff, or that the decision not to

grant him tenure and promotion was based upon illegal motivation. Specific complaints raised by plaintiff are addressed below.

Failure to act

Several of plaintiff's complaints involve alleged omissions. Plaintiff contends that Gentry failed to remove from plaintiff's tenure dossier a letter written by an outsider reviewer, Frank Hoy, which refers to plaintiff's minority status. The portion of the letter which plaintiff finds objectionable states, about the material plaintiff submitted for promotion and tenure:

> At that point, Cuenca brings up a minority issue that, I believe, has no place in such a statement. Until this point I had no knowledge he was a minority. I edited out the last portion and produced a much more palpable, 36 supportive statement beneficial to Cuenca.

Dk. 186, plaintiff's App. B, p. 445, Exh. 128. Mr. Hoy additionally stated, as part of his recommendation that plaintiff be denied tenure, that "the information contained in Cuenca's own voluntary statements can be taken as a forewarning of future attitude, perhaps even problems, when he is an Associate Professor with tenure." *Id.*, p. 446.

This outside reviewer was one selected by plaintiff and not by any defendant. Plaintiff's tacit assertion that Gentry had any authority, let alone any duty, to remove from plaintiff's dossier any statement submitted by an outside reviewer chosen by plaintiff is unsupported by the facts. No spectre of discrimination or retaliation is raised based upon the fact Hoy's statement remained a part of plaintiff's tenure package.

Adoptive admissions

Plaintiff additionally contends that Hoy's statement as an outside reviewer in 1999, Kautsch's statements in 1995, and Frederickson's newspaper statement in

2000, evidence racial animosity, and that because such statements were not expressly disclaimed by the decision-making committees and KU's Provost and Chancellor, they were adopted by such committees.

When determining whether a party has manifested a belief in the truth of a document, so as to constitute an adoptive admission, the test is:

> "whether the surrounding circumstances tie the possessor and the document together in some meaningful way." *Id.* (citations and internal quotation marks omitted). A document is sufficiently "tied" to the possessor "to the extent the adoptive party accepted and acted upon the evidence." *Id.*

Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1268 (10th Cir. 1998), citing *Pilgrim v. Trustees of Tufts College*, 118 F.3d 864 (1st Cir. 1997)(finding adoptive admission by college president who reviewed discrimination report by grievance committee, then implemented each of the report's recommendations, because president would not have so acted unless he accepted the report's conclusions as the truth.)

Plaintiff fails to show that any of the statements he claims defendants adopted were accepted by the decision makers who then acted in reliance upon those statements, instead of in reliance upon other factors. Accordingly, the court cannot consider any of those statements to be adoptive admissions.

"Fraud" by Gentry

Plaintiff contends that Gentry's late submission to external reviewers of copies of the book chapters plaintiff had written constitutes "fraud," and, apparently, a violation of the faculty code of conduct. It is undisputed that when this omission was brought to Gentry's attention, Gentry sent the book chapters, one of which had just been published, to the external reviewers, with a

follow-up letter. Although some reviewers had already sent their evaluations of plaintiff to Kautsch before receiving and reviewing the book chapters, all were specifically asked if the book chapters would have affected their evaluation, and replied negatively.

Plaintiff has not shown that Gentry's initial failure to submit plaintiff's book chapters was intentional, was related to plaintiff's race or protected conduct, or had any effect whatsoever upon the reviewers' assessment of whether plaintiff should receive promotion and tenure.

The court thus finds that defendant has failed to present a prima facie case of retaliation, race or national origin discrimination, whether pursuant to Title VII, § 1981, or 1983. *See Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991) (stating a claim of intentional discrimination under 42 U.S.C. § 1983 is subject to the same methods of proof as an analogous claim under Title VII).

Legitimate business reasons

Plaintiff has failed to produce any direct or circumstantial evidence that defendants, or any of them, acted with a discriminatory motive. Even assuming plaintiff established a Title VII prima facie case, defendants have articulated legitimate, nondiscriminatory reasons for their decisions. "Defendants need not prove that their nondiscriminatory reason is true or litigate the merits of their reason; they only need to provide a nondiscriminatory reason that is specific and clear." *Meiners*, 239 F. Supp. 2d at 1194-95. Defendants have done so, as noted above.

No Pretext

To overcome defendant's summary judgment motion, plaintiff must demonstrate a factual question whether defendants' articulated reasons are a pretext for discrimination or retaliation. The relevant inquiry is not

whether defendants' proffered reasons are correct, but whether defendants "honestly believed those reasons and acted in good faith upon those beliefs." *Bullington*, 186 F.3d at 1318. When examining the issue of pretext, the Court examines the facts as they appeared to the persons making the decision, *see Doebele v. Sprint Corp.*, 157 F. Supp. 2d 1191, 1216 (D. Kan. 2001), and does not second guess the business judgment of the employer, *see Simms v. Okla. ex rel. Dept. of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999).

Plaintiff has not presented sufficient evidence to create a genuine dispute of material fact as to whether the defendants' proffered reasons are pretext for racial discrimination or retaliation. *See Falcon v. Trustees of State Colleges in Colorado*, 216 F.3d 1087, 2000 WL 779860, *5 (10th Cir. June 19, 2000) (Table) (finding isolated comments not shown to be related to the decision to deny tenure insufficient to show pretext). Even assuming, *arguendo*, that KU misjudged plaintiff's qualifications or used questionable criteria in evaluating his promotion and tenure application, his work performance, or his applications for other positions, such evidence would not preclude summary judgment on his claims of race discrimination and retaliation, as no cognizable evidence of pretext has been presented.

Hostile Work Environment Claim

Plaintiff alleges that he was subjected to a hostile work environment at KU by defendants Kautsch and Gentry, and Prof. Frederickson, based on acts detailed in the statement of facts above. Specifically, plaintiff contends that a "hostile" article written by Frederickson in the student newspaper on February 25, 2000, evidences racial harassment. *See* plaintiff's App. B, p. 428, Exh.122. To survive summary judgment, plaintiff must show "that a rational jury could find that the

workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *McCowan v. All Star Maint., Inc.*, 273 F.3d 917, 923 (10th Cir. 2001) (quotations omitted). Such hostility or harassment must be based upon plaintiff's protected class, such as race or national origin. *See Bolden v. PRC Inc.*, 43 F.3d 545, 551-52 (10th Cir. 1994) (affirming summary judgment on hostile work environment and constructive discharge claims where plaintiff failed to establish that he and other employees were singled out for abuse by their co- workers because of their race).

Frederickson's statements, whether viewed in isolation or in conjunction with all the other events of which plaintiff complains, fall far short of actionable racial harassment. None of the language used in the article is racially derogatory. Instead, the article merely speaks to plaintiff's having missed class, states why Frederickson believed that a public response to plaintiff's assertions was necessary, and gives numerous reasons in refutation of plaintiff's allegations of racism, including that Frederickson's wife is a Filipino American.

Absent from the record are the traditional indicia of a harassment claim. No evidence of any racial language, racial epithets, or other negative factors which permeate the work place atmosphere has been shown. Although there were rare occasions on which plaintiff's minority status was mentioned by defendants or an outside reviewer, the statements made do not reflect racial animus, and do not collectively approach the level of severity or pervasiveness necessary for a hostile work environment claim. *See generally Gunnell v. Utah Valley State College,* 152 F.3d 1253, 1265 (10th Cir. 1998) (stating Title VII is neither a "general civility

code" nor does it make actionable the ordinary tribulations of the workplace.) The same is true for all other statements in the record which allude to race, including but not limited to Hoy's statement as an outside reviewer in 1999, Kautsch's statements in 1995, and Frederickson's statements in February of 1999. The court finds plaintiff raises no genuine issue of material fact as to whether the defendants, or any of them, engaged in prohibited racial harassment.

Section 1983 Due Process Claim

Plaintiff alleges that defendants deprived him of due process, but fails to specify whether his claim is of a substantive or procedural deprivation. In either event, plaintiff must show that he possessed a protected property interest in continued employment such that due process protections were necessary. To prove a substantive deprivation, plaintiff must additionally show that defendants deprived him of that property interest in a manner that was either arbitrary or capricious. *See Clinger v. New Mexico Highlands University, Bd. of Regents,* 215 F.3d 1162 (10th Cir. 2000); *Ware v. Unified School Dist. No. 492, Butler County, State of Kan.*, 881 F.2d 906, 912 -913 (10th Cir. 1989); *Meiners*, 239 F. Supp. 2d at 1198.

Tenured professors have a property interest in continued employment. *See Tonkovich v. Kan. Bd. Of Regents*, 159 F.3d 504, 517 (10th Cir. 1998). But professors who are not tenured and who are at-will employees do not have a legitimate claim of entitlement to their reappointment absent a specific contractual guarantee to that effect, under Kansas law. *See Meiners*, 239 F. Supp. 2d at 1198. The record fails to show that plaintiff, a non-tenured professor, had any contractual agreement to be reappointed, thus he had no property interest in his position.

But even assuming plaintiff had a property interest in continued employment with KU, there is no evidence in the record that the deprivation of any property interest was either arbitrary or capricious. Accordingly, plaintiff has not raised a genuine issue of material fact on any due process claim.

Qualified Immunity

Defendant asserts that the individual defendants are entitled to qualified immunity. This doctrine shields government officials from personal liability under 42 U.S.C. § 1983 "unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Baptiste v. JC Penney Co., Inc.*, 147 F.3d 1252, 1255 (10th Cir. 1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Where the defense of qualified immunity is raised, the first step in analyzing plaintiff's 42 U.S.C. § 1983 claim "is to identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1714 n. 5, 140 L. Ed. 2d 44 1043 (1998). "Where a plaintiff fails to demonstrate that a defendant's conduct violated the law, [the court] need not reach the issue of whether the law was clearly established." *Barney v. Pulsipher*, 143 F.3d 1299, 1309 (10th Cir. 1998).

The court has concluded above that plaintiff's allegations fail to raise a material question of fact that he suffered a constitutional deprivation at the hands of defendants. Accordingly, the court declines to address the second prong of defendants' qualified immunity defense.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment or partial summary judgment (Dk. 183) is denied; that defendant's motion for summary judgment (Dk. 192) is granted; that defendant's motion for leave to substitute corrected memo-

randum (Dk. 196) is granted; that defendant's motion to strike plaintiff's affidavit (Dk. 199) is granted in part and denied in part; and that plaintiff's motion for leave to file a surreply (Dk. 208) is granted.

Dated this 8th day of May, 2003, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

APPENDIX B —Judgment Of The District Court, Filed May 9, 2003.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MICHAEL R. CUENCA,
Plaintiff,

vs. Case No. 98-4180-SAC

UNIVERSITY OF KANSAS,
MYRON A. KAUTSCH, Individually,
and JAMES K. GENTRY, Individually,
Defendants.

JUDGMENT IN A CIVIL CASE

This action came on for decision by the court. The issues have been considered and a decision has been rendered. IT IS ORDERED AND ADJUDGED that in accordance with the Memorandum and Order filed May 9, 2003, the plaintiff's motion for summary judgment or partial summary judgment (Dk. 183) is denied; and defendant's motion for summary judgment (Dk. 192) is granted.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Michael R. Cuenca, take nothing and the action is dismissed on the merits; the defendants, University of Kansas, Myron A. Kautsch, Individually, and James K. Gentry, Individually, to recover of plaintiff, Michael R. Cuenca, its costs of action.

Dated: May 9, 2003 RALPH L. DeLOACH,
CLERK

By s/ Brenda M. Wessel
Brenda M. Wessel
Deputy Clerk

APPENDIX C — Order And Judgment Of The Appeals Court, Filed June 15, 2004.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 03-3145
(D.C. No. 98-CV-4180-SAC)
(D. Kan.)

MICHAEL R. CUENCA,
Plaintiff-Appellant,
v.
UNIVERSITY OF KANSAS;
MYRON A. KAUTSCH and
JAMES K. GENTRY, as individuals,
Defendants-Appellee.

ORDER AND JUDGMENT*

Before **EBEL**, **BALDOCK**, and **LUCERO**, Circuit Judges.

Even though the appellant appears pro se, this case presents a representative example of a problem increasingly encountered by the federal courts: the submission of voluminous and poorly organized materials in connection with summary judgment matters. Mi-

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*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

chael R. Cuenca brought this action pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, alleging that the defendants had discriminated against him on the basis of race, violated his constitutional rights, and illegally retaliated against him when he complained. In response to the defendants' motion for summary judgment, Cuenca submitted a ninety-page autobiographical affidavit, containing 248 paragraphs, replete with conclusory statements, statements of opinion, and matters patently beyond his personal knowledge. He supported this affidavit with nearly 1000 pages of supplementary materials, much of it of dubious admissibility and relevance. The district court winnowed Cuenca's claims and materials, and entered a twenty-five page, published decision granting summary judgment for the defendants.[1] *Cuenca v. Univ. of Kan.*, 265 F. Supp. 2d 1191 (D. Kan. 2003).

Cuenca's opening brief in this court does not help to narrow or refine the issues. It contains an introductory factual statement that presents a lengthy account of his employment with the University of Kansas and the University of Kansas's alleged discriminatory policies. He does not tie this amalgamation of background information and potentially relevant complaint to the later legal argument sections of the brief, however, some of which are devoid, or nearly devoid, of particularized factual or evidentiary references. In effect, Cuenca has presented a mass of miscellaneous material and left it to this court to collect, organize, and articulate the cumulative legal significance of pertinent items therein with respect to each of his various claims.

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[1]Throughout its summary judgment order, the district court refers to the "defendant" however, all defendants moved for summary judgment and it is apparent that the district court granted summary judgment for all of them.

The argument section of Cuenca's brief gives only the most cursory focus to most of the incidents and facts presented to the district court. He relies, for example, on "the 'voluminous' record of disciplinary actions, poor performance reviews, lower salary increases, exclusion, hyperscrutiny, misrepresentation of facts, violations of procedures and denials of due process" he claims can be found in the record. Aplt. Opening Br. at 17. He refers vaguely to "myriad, changing reasons, reasons unworthy of belief, deliberate misconduct, and several instances of lying under oath or in written documents, which provide ample, sufficient evidence of pretext and mendacity," citing only one specific example of the same. *Id.* at 18-19. He asserts that the district court failed to draw all necessary inferences in the light most favorable to him. He fails, however, to describe what specific inferences, based on specific evidence, that it should have drawn in his favor. *Id.* at 21-22. Notwithstanding the limited number of specific, fact-based arguments he presents, Cuenca apparently wishes us either to perform his task of applying the law to the facts, or-worse yet-to comb the entire record and to refine his arguments concerning the incidents he described in his voluminous submissions to the district court. This we will not do.

We will not become advocates for Cuenca, combing the record to make his case for him. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998); *see also Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995). Appellate arguments must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(9)(A).

We uphold the district court's treatment of Cuenca's affidavit and supporting materials. On appeal, we

limit our review to the issues raised and properly supported.

I

The district court's order recites the facts in detail, and we do not repeat them here. The Journalism School at the University of Kansas hired Cuenca in 1994 as a tenure-track Assistant Professor of Visual Communications. Cuenca's birth certificate specifies his father's race as Filipino, and Cuenca identifies himself as Hispanic based on his Mexican ancestry. Cuenca asserts that the University of Kansas and the other named defendants discriminated against him on the basis of race and retaliated against him in various ways from the time he was hired until he was denied tenure and his appointment ended in 2001.

II

A

Before turning to the merits of the summary judgment determination, we begin by analyzing Cuenca's procedural issues. He contends that the district court erred: (1) by granting defendants' motion to substitute a revised summary judgment memorandum and without permitting him to respond to the memorandum; and (2) by striking portions of his summary judgment affidavit without specifying which portions it struck.

1

The defendants moved to substitute a corrected memorandum of law in support of their motion for summary judgment, because their original motion exceeded the district court's page limitation and contained a factual error. Contrary to Cuenca's argument, this was not a "completely new motion for summary dismissal." Aplt. Opening Br. at 11. The changes were minor and, except for the correction of the fact error, were not substantive. Cuenca fails to show that he was prejudiced in any way by the substitution. The district

court did not abuse its discretion by permitting substitution.

2

The defendants moved to strike Cuenca's affidavit. The district court did not disregard Cuenca's affidavit in toto as insufficient under Fed. R. Civ. P. 56(e), as defendants requested. Instead, it stated it would simply disregard any inadmissible portions of the affidavit. *Cuenca*, 265 F. Supp. 2d at 1200.

Cuenca contends that the district court's approach has deprived him of an opportunity to obtain review of its specific evidentiary determinations. We review the district court's decision on evidentiary issues pertaining to summary judgment for an abuse of discretion and we have previously approved the district court practice of ignoring inadmissible portions of an affidavit, as an alternative to disregarding the entire affidavit. *Jones v. Barnhart*, 349 F.3d 1260, 1270 (10th Cir. 2003). Cuenca's complaint about the lack of evidentiary rulings is significant only to the extent that the improper exclusion of evidence resulted in a substantive error in the summary judgment determination.[2] In examining the record for substantive error, however, we consider only the specific challenges that Cuenca raises and properly supports in his briefs on appeal. As to those errors, we conclude that even if the district court had considered all (and excluded none) of the evidentiary material in Cuenca's affidavit, summary judgment would still be appropriate.

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2 Our review of Cuenca's affidavit convinces us that some of the materials should have been excluded as a matter of law, because they are conclusory, represent opinion rather than fact, or show on their face that they were not made from personal knowledge. See *BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1101 (10th Cir. 1999); *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999); Fed. R. Civ. P. 56(e).

B

We next review the merits of the district court's summary judgment determination.

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. We review a grant of summary judgment *de novo*, applying the same standard as the district court. We examine the record to determine whether any genuine issue of material fact was in dispute; if not, we determine whether the substantive law was applied correctly, and in so doing we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion. However, where the non moving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment.

Neal v. Roche, 349 F.3d 1246, 1249 (10th Cir. 2003) (quotation omitted).

On appeal, Cuenca argues that the district court: (1) failed to apply properly the mixed-motive analysis contained in Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B); (2) disregarded his direct evidence of discrimination and retaliation; (3) failed to draw all necessary inferences in the light most favorable to him; and (4) improperly disregarded his statistical evidence.

1

We consider Cuenca's first two summary judgment issues together. Cuenca argued to the district court that his case should be governed by the mixed-motive analysis set forth in § 107 of the 1991 Civil Rights. The district court did not directly address this argument. It may have rejected Cuenca's mixed-motive analysis, however, based on its conclusion that he had presented no direct evidence of discrimination and retaliation. *Cuenca*, 265 F. Supp. 2d at 1205. At the time of the district court's decision, cases in this circuit held that a plaintiff seeking to employ a mixed-motive analysis was required to show direct evidence of discrimination. *See, e.g., Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 n.4 (10th Cir. 1999).

After the district court reached its decision in this case, however, the Supreme Court determined that a plaintiff may prove the mixed-motive analysis under § 107 of the 1991 Act by circumstantial evidence as well as direct evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-102 (2003). Cuenca now argues both that he has provided direct evidence of discrimination and that, in any event, the circumstantial evidence he offered meets the standards of § 107.

Cuenca did not provide direct evidence of discrimination or retaliation that would permit his claims to go to a jury on a mixed-motive theory. Direct evidence requires "proof of an existing policy which itself constitutes discrimination," *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1477 (10th Cir. 1996) (quotation omitted), or "oral or written statements on the part of a defendant showing a discriminatory motivation," *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000). Statements which on their face merely state a personal opinion are not direct evidence. *Tomsic*, 85 F.3d at 1477. The district court correctly

found that Cuenca failed to point to any direct evidence of discrimination. We specifically analyze each of the statements on which Cuenca relies for his direct evidence argument in the following paragraphs of this order and judgment, concluding that they also do not provide circumstantial evidence of discrimination.

The specific incidents Cuenca details in his brief also do not provide circumstantial evidence demonstrating that unlawful discriminatory animus motivated the University of Kansas's adverse employment decisions. *See Mereish v. Walker*, 359 F.3d 330, 339 (4th Cir. 2004) (interpreting summary judgment burden under Civil Rights Act of 1991 in light of *Desert Palace*). Cuenca relies primarily on the statements of Frank Hoy, an outside tenure reviewer chosen by Cuenca who criticized Cuenca for "bring[ing] up a minority issue" in his statement of teaching philosophy, and warned that "the information contained in Cuenca's own voluntary statements can be taken as a forewarning of future attitude, perhaps even problems" if Cuenca were granted tenure. *Cuenca*, 265 F. Supp. 2d. at 1212 (record citations omitted). The district court found that Cuenca had failed to provide any evidence that the University of Kansas adopted or relied on these statements in reaching the decision to deny him tenure.

In general, statements by a non-decisionmaker, such as Hoy, cannot be used to establish that a decision was tainted by discriminatory animus. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998) (age discrimination case). An exception arises when the record contains evidence from which a reasonable inference may be drawn that a decisionmaker adopted or relied upon the allegedly discriminatory statement in reaching its decision. *See, e.g., Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1097 (6th Cir. 1996). Relying on this exception, Cuenca argues that

the University of Kansas's failure to disavow Hoy's statements should result in an inference that its decisionmakers took Hoy's comments into account when making their decision. The inferential burden runs the other way, however; Cuenca had the burden to link the outside reviewer's statements to the decision to deny tenure. *See id.* Because he failed to create a genuine issue of material fact on this point summary judgment was proper.[3]

Cuenca also relies on a comment by Ted Fredrickson, a fellow faculty-member, who he alleges "once warned me that playing the race card in this workplace would cost me." (V R. ex. 22, at 1.) This isolated observation, unrelated to any employment action, is neither direct nor circumstantial evidence of discrimination or retaliation. Nor does Fredrickson's statement to a student newspaper defending the current and former dean against Cuenca's allegations of racism and dismissing Cuenca's assertion of discriminatory motivation as "an unvarnished falsehood and an unwarranted attack" that would have an adverse impact on the Journalism School, demonstrate discriminatory or retaliatory animus by defendants. (VI R. ex. 122.)

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3 Cuenca's reliance on language in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), is unavailing. In that case, the evidence showed that the decisionmaker for a partnership "solicited evaluations from all the firm's partners" and "generally relied very heavily on such evaluations in making its decision." *Id.* at 256. Given these facts, the defendant's Policy Board's failure to disclaim reliance on stereotyped comments made by some of the partners raised an inference that the decision to place the plaintiff's candidacy on hold was the product of discrimination. *Id.* Here, however, Hoy was not affiliated with the University of Kansas and Cuenca failed to show that the University of Kansas's decisionmakers relied on the statements about race in Hoy's evaluation in reaching their decision.

Cuenca also challenges a statement by defendant former Journalism School Dean Kautsch in a 1995 letter to his superiors, stating that he was attempting to terminate Cuenca because Cuenca was "making demands and stating expectations." (VI R. ex. 159; *see* Aplt. Opening Br. at 16.) Cuenca argues that nonminority personnel also made demands and stated expectations at times, without being subject to termination. Kautsch's actual statement, however, was that Cuenca was "making demands and stating expectations that can not be met because they exceed the School's budgetary capacity and are inconsistent with the duties he was hired to perform." (VI R. ex. 159.) Cuenca fails to show that Kautsch's analysis of Cuenca's demands was unworthy of belief or a pretext for discrimination. Moreover, as the district court noted, Cuenca failed to present evidence to show that the University of Kansas terminated his employment as the result of the demands and expectations complained of in Kautsch's letter.

Cuenca further charges that the University of Kansas's Equal Employment Opportunity (EEO) coordinator improperly suspended investigation of Cuenca's internal discrimination complaint after the University of Kansas's counsel blamed Cuenca for a failed mediation. The coordinator testified that Cuenca was responsible for ending the mediation process, and that he did so because the process could not give him the immediate tenure he sought. Noting the coordinator's further testimony that he learned that Cuenca was seeking immediate tenure from the University of Kansas's attorney, Cuenca argues that the attorney's statement, coupled with the decision to terminate mediation, is evidence of discrimination or retaliation. He points us to no evidence in the record, however, that he did not in fact seek tenure through the mediation.

Moreover, he fails to establish that the statements by the University of Kansas's counsel, or the decision to terminate internal mediation in favor of the outside EEOC process constituted an "adverse employment action" that had an effect on his employment status. *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 533 (10th Cir. 1998).

Finally, Cuenca contends there is evidence of retaliation in a brief defendants filed in this case. He argues that in Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment the defendants presented a justification for actions taken against him based on his opposition to discrimination in the workplace. Defendants argued in that pleading that "[a]t worst, Plaintiff has shown Kautsch and Gentry as supervisors who were often frustrated by Plaintiff's lack of collegiality, unprofessional behavior, and unwarranted personal attacks on students, colleagues, the Journalism School, the University of Kansas or others. The evidence also showed that Plaintiff often wrote inflammatory correspondence to others." (I R. doc. 205 at 16-17.)

Cuenca argues that this statement shows that defendants not only developed illegal animus against him, but believed that their illegal animus was justified. In our view, however, this statement says nothing of the kind, nor can illegal motives be imputed to defendants based on this statement. The record reveals that Cuenca's letters and e-mails to his supervisors contained a large amount of vituperation, impertinence, and criticism of both the University of Kansas administration and colleagues.[4]17 The discrimination stat-

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4 Cuenca contends that other, non-minority faculty clashed with Kautsch but were not subjected to the threat of non-renewal of their appointment. He fails to show, however, that these faculty used the kind of language or tone with Kautsch that Cuenca did.

utes do not confer a license to present grievances in an arrogant and uncivil manner. *See Robbins v. Jefferson County Sch. Dist. R-1*, 186 F.3d 1253, 1259-60 (10th Cir. 1999), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Cuenca fails to show that the defendants' stated aversion for the inappropriate tone and presentation of his grievances was a pretext for an intent to retaliate based on his protected activities.

2

Cuenca claims that the district court drew no reasonable inferences in his favor, as required by the summary judgment standard. He provides only one example, however, of an inference that should have been drawn but was not. He claims the district court "dismissed defendant Gentry's withholding of materials from external reviewers as some sort of harmless error, ignoring Gentry's subsequent lies, his perjury, and his deliberate, willful misconduct . . . ." Aplt. Opening Br. at 22.

Our review of the record convinces us that the district court did not simply "dismiss" the issue of the book chapters omitted from tenure materials "as some sort of harmless error." *Id.* Rather, the district court gave several reasons why Cuenca could not use this incident as evidence of either discrimination or retaliation. First, when the omission was brought to Gentry's attention, he "sent the book chapters, one of which had just been published, to the external reviewers, with a follow-up letter." *Cuenca*, 265 F. Supp. 2d at 1213. Second, Gentry asked all of the reviewers for a letter indicating that the book chapters would not have affected their evaluation, and all replied negatively. *Id.*

Third, Cuenca failed to show that Gentry's failure to submit the book chapters was intentional, was related to Cuenca's race or protected conduct, or had any effect on the reviewers' assessment of him (and, hence, on the ultimate decisionmakers concerning tenure). *Id.* We agree with the district court's reasoning on these points; Cuenca fails to provide evidence that Gentry's explanation that the error was unintentional was unworthy of belief.

Cuenca also contends, however, that Gentry lied under oath when asked if he had sent all the materials to the outside reviewers. Cuenca provides no citations to the record for this claim. We presume he is referring to Page 151 of Gentry's deposition in which he was asked:

Q. Did you send his books-
A. Yes.
Q. -to each evaluator?
A. Yes.
Q. So there were two [books], right?
A. (Nods head up and down).

(V R. doc. 186, ex. 87, at 13.)

Gentry's deposition was taken on February 7, 2000, long after he had supplied the outside reviewers with copies of chapters from two of Cuenca's books in response to the notice to him that they had been omitted from the initial submission. Since the questions make no reference to time frame, Cuenca fails to show that Gentry's reference to "books" sent to reviewers did not refer to this later submission. In any event, the challenged statement fails to create a genuine issue of material fact concerning whether the reasons given in the ultimate decision to deny tenure were pretextual.

In his reply brief, Cuenca further argues that Gentry lied when he stated that Cuenca had not fulfilled the Journalism School's requirements for tenure and had not achieved national or regional distinction. This,

however, was also the conclusion of a number of the outside reviewers. Cuenca's disagreement with Gentry's assessment of his qualifications does not create a genuine issue of material fact that would preclude summary judgment. This court does not "act as a 'super personnel department' that second guesses employers' business judgments." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1333 (10th Cir. 1999).

Cuenca claims that Gentry admitted at his deposition that he had lied about Cuenca's qualifications for tenure. He asserts that at the deposition, Gentry changed course from his previous statements that Cuenca had no work that had achieved distinction through review by his peers. Our reading of the deposition transcript does not support this interpretation. At the deposition, Gentry was asked about Cuenca's Lowell Thomas Travel Journalism Award. Gentry classified the award as "a very minor, modest award" that was "a good start" but not an award of national significance. (V R. ex. 102, at 3 (depo. at 171-72).) Contrary to Cuenca's claim in his affidavit, Gentry did not admit at his deposition that the Lowell Thomas Travel Journalism award was a peer-reviewed award; instead, he only said "it could be peer reviewed in a sense." (V R. doc. 186, ex. 102, at 4 (depo. at 175).)

Cuenca also claims that Gentry lied in denying that he had peer-reviewed work because Cuenca had earned a peer-reviewed award from the Association for Education in Journalism and Mass Communication (AEJMC). The AEJMC award, however, was only an "honorable mention." (V R. doc. 186, ex. 102, at 4 (depo. at 176).) Whether or not Cuenca believed, as Gentry put it, that his two awards "demonstrate . . . work [that] has been judged by peers as being significant, demonstrating rigor, or demonstrating original-

ity," V R. doc. 186, ex. 70, at 2, Gentry did not. The fact that Cuenca can point to some works that he believes met the University of Kansas's criteria does not show that Gentry lied or that his recommendation concerning Cuenca's tenure was pretextual.

3

Cuenca contends that the district court disregarded his "direct evidence of previous illegal acts, statistical direct evidence of pattern and practice discrimination, and direct evidence of past violations of federal civil rights law." Aplt. Opening Br. at 24. The district court rejected the statistical evidence as failing to provide any effective data concerning the tenure issues presented in his case. *Cuenca*, 265 F. Supp. 2d at 1205-06. It further rejected evidence of the University of Kansas's non-compliance with the Office of Federal Contract Compliance Programs, because the evidence failed to demonstrate substantive violations indicating discrimination. *Id.* at 1206.

Cuenca faults the University of Kansas for not providing accurate and complete data through the discovery process. He contends "defendants refused to produce accurate and complete applicant flow data and the District Court affirmed the magistrate judge's determination that defendants would not be compelled to produce it." Aplt. Opening Br. at 25. Cuenca fails to make any substantive argument to show how the district court abused its discretion in denying his motion to compel. This being the case, we cannot review his claim that he should have been granted additional discovery. Instead, we will examine the data that he actually presented to the district court. Having examined this data, we agree with the district court that Cuenca has failed to present relevant statistical data or other direct evidence sufficient to carry his summary judgment burden.

C

Finally, Cuenca argues that the district court judge, who he claims is a University of Kansas graduate, should have recused himself from hearing this case. He fails to cite us to any motion to recuse, however, or to any facts in the record that would confirm the judge's alumni status or his reasons for failing to recuse himself. Given this failure of proof, we are left with nothing to review pertaining to Cuenca's recusal arguments under 28 U.S.C. § 455(a), and therefore decline to order recusal.

We **AFFIRM** the order of the district court granting summary judgment for the defendants and denying Cuenca's motion for summary judgment.

Entered for the Court

Carlos F. Lucero
Circuit Judge

APPENDIX D — Order Of The Appeals Court, Filed July 28, 2004.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 03-3145

MICHAEL R. CUENCA,
Plaintiff-Appellant,
v.
UNIVERSITY OF KANSAS;
MYRON A. KAUTSCH and
JAMES K. GENTRY, as individuals,
Defendants-Appellee.

ORDER
Filed July 28, 2004

Before **EBEL**, **BALDOCK**, and **LUCERO**, Circuit Judges.

This case comes before us on plaintiff/appellant Michael R. Cuenca's petition for rehearing en banc. Upon consideration, we grant panel rehearing for the limited purpose of modifying our June 15, 2004 order and judgment as follows:

1. The first full paragraph on page three of the order and judgment is modified by deleting the fifth sentence in the paragraph and replacing it with the following sentence:

"He describes however, only two such specific instances that should have been drawn in his favor."

2. The first full paragraph on page seventeen of the order and judgment is modified by deleting the paragraph in its entirety and replacing it with the following paragraph:

Cuenca claims that Gentry admitted at his deposition that he had lied about Cuenca's qualifications for tenure. He asserts that at the deposition, Gentry changed course from his previous statements that Cuenca had no work that had achieved distinction through review by his peers. Our reading of the deposition transcript does not support this interpretation. At the deposition, Gentry was asked about Cuenca's Lowell Thomas Travel Journalism Award. Gentry classified the award as "a very minor, modest award" that was "a good start" but not an award of national significance. (VR. ex. 102, at 3 (depo. at 171-72).). While Gentry admitted at his deposition that the award was peer-reviewed, he characterized it as a minor award, noting that it was a bronze award, for third place, from a "narrow, very small group of journalists." (*Id.* at 4 (depo. at 174, 176)). This is consistent with Gentry's evaluation of Cuenca's work in the letter he sent to the Promotion and Tenure Committee. (*Id.*, ex. 70, at 2).

The petition for rehearing en banc was circulated to the panel and to all judges of this court in active service. No judge voted to grant rehearing or called for a poll. Other than the changes noted above that we have made on panel rehearing, the petition for rehearing en banc is therefore denied.

Entered for the Court
Patrick Fisher, Clerk
By:
s/Steve Larson
Deputy Clerk

APPENDIX E — Memorandum In Support Of Plaintiff's Motion For Summary Judgment/Partial Summary Judgment, Filed Nov. 22, 2002.

IN THE UNITED STATES DISTRICT COURT DISTRICT OF KANSAS

Michael R. Cuenca,	]	
	]	
Plaintiff	]	
vs.	]	
	]	**CASE NO. 98-4180-SAC**
	]	
University of Kansas, Myron A. Kautsch, and James K. Gentry,	]	
	]	
Defendants.	]	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT/PARTIAL SUMMARY JUDGMENT

COMES NOW the plaintiff, Michael R. Cuenca, *pro se*, and submits the following memorandum in support of his Plaintiff's Motion for Summary Judgment/Partial Summary Judgment. In support thereof, plaintiff alleges and states, as follows:

STATEMENT OF FACTS

1. Plaintiff asserts the facts stipulated in the parties' Final Pre-Trial Order (Docket 182) and the facts set forth below.

2. When plaintiff applied for and was found qualified for the position of Assistant Professor of Visual Communications, defendant University's School of Journalism sought administrative approval to offer the position to two candidates. The approved salary offer for the two candidates was identical. (Appendix A, paragraphs 25-27.)

3. After the white male candidate declined the offer of employment, Defendant Kautsch lowered the amount of salary offered to the plaintiff. (*Id.*)

4. Eleven days after his third request for relief from a discriminatory teaching overload, which he had copied to defendant Kautsch, plaintiff received notice from Kautsch that he was removing the plaintiff from the School's technology committee. (Appendix A, paragraph 45.)

5. After Plaintiff and defendant Kautsch met in Kautsch's office on Monday, December 11, 1995 to discuss plaintiff's written complaint of disparate treatment, Kautsch instituted immediate and extraordinary actions to terminate the plaintiff. Defendant Kautsch wrote to his own supervisor that the reason the plaintiff would be terminated "would be that the faculty member is making demands and stating expectations . . ." (Appendix A, paragraph 59.)

6. Defendant University's Provost (then called Vice Chancellor of Academic Affairs) was informed of Defendant Kautsch's extraordinary actions against the plaintiff as they were progressing in December, 1995, through letters written by both defendant Kautsch and the plaintiff. (Appendix A, paragraphs 54-59.)

7. Defendant University initiated neither disciplinary action against defendant Kautsch nor remedial action to restore the plaintiff.

8. In January 1996, defendant Kautsch placed the plaintiff under a "special review," the conditions of which violated plaintiff's rights under the First Amendment, Title VII, and the defendant University's own policies and procedures. (Appendix A, paragraph 67.)

9. In March of 1996, defendant Kautsch unilaterally promoted an employee of defendant's School of Journalism to a brand new position, that he called the Integrated Media Lab general manager. The responsibilities of this position were similar to plaintiff's job description and were within the plaintiff's qualifications. Defendant Kautsch rewarded the promoted employee with a 22% raise. (Appendix A, paragraphs 77.)

10 Kautsch violated University employment search policies by not advertising the position and not allowing plaintiff the opportunity to apply for the position. (Appendix A, paragraph 78.)

11. On May 6, 1996, plaintiff met with defendant University's Office of Equal Opportunity director, Maurice L. Bryan, to register a complaint of racial discrimination. (Appendix A, paragraphs 79.)

12. Ten days later, the plaintiff received an undeserved negative annual performance evaluation and it included an annual salary increase of $180, which the letter also said was the lowest raise of any faculty member in the School of Journalism. (Appendix A, paragraph 80.)

13 Defendant University's Professor Theodore P. Frederickson investigated the circumstances and connected the adverse employment action to the plaintiff's protected activity. (Appendix A, paragraphs 81-82.)

14. In May of 1996, defendant University of Kansas discriminated against the plaintiff by awarding him a salary increase that was the lowest of any tenure-track faculty member in the defendant University's School of Journalism. (Appendix A, paragraph 80.)

15. The plaintiff's salary increase was more than 5 standard deviations below the mean of the others of the defendant University's School of Journalism's tenure-track faculty. (Appendix A, paragraph 94.)

16. On June 3, 1996, plaintiff wrote Provost David E. Shulenburger a plea for help (Appendix A, paragraph 88.)

17. Provost Shulenburger took no action to restore the plaintiff, even though once again he had been asked directly by defendant Kautsch to approve a questionable plan obviously designed to terminate the plaintiff (Appendix A, paragraphs 83-87).

18. In the fall of 1996, plaintiff again sought help directly from Provost Shulenburger. (Appendix A, paragraph 106.)

19. After plaintiff's fall 1996 request to the Provost for remedial action, defendant University took no action to restore the plaintiff or protect his rights.

20 Plaintiff filed a formal complaint with the KHRC/EEOC in February 1997. Concurrently, the defendant's Office of Equal Opportunity initiated an investigation into the plaintiff's complaint of discrimination and retaliation. (Appendix A, paragraph 107.)

21. In June of 1997, the director of defendant University's Office of Equal Opportunity, Maurice L. Bryan, Jr., abruptly closed his office's internal investigation of

the Plaintiff's complaint of illegal discrimination and retaliation. (Appendix A, paragraphs 111-112.)

22. Bryan testified that it is not the formal policy of his office to automatically suspend an investigation into an employee's allegations of discrimination. (Appendix A, paragraphs 114.)

23. Bryan testified that he undertook no investigation into the plaintiff's complaint, either prior to or after he suspended the investigation in June of 1997. (Appendix A, paragraphs 115.)

24. Bryan also testified that according to the defendant University's formal policies, when allegations of discrimination come to the attention of the administration it is the responsibility of the administration, "[t]o investigate the allegations and to take, and to take appropriate action as a result of that investigation." (Appendix A, paragraph 116.)

25. Bryan stated that he suspended the plaintiff's internal complaint specifically because he said the plaintiff ended the mediation of the external complaint. (Appendix A, paragraph 113.)

26. Plaintiff applied for the position of New Media Leader in October of 1997. The defendants determined the plaintiff to be qualified. The plaintiff was found to be one of only four qualified applicants, but was denied an interview. The remaining three candidates were interviewed and all were white males. Plaintiff was rejected for the position (Appendix A, paragraphs 126-135).

27. None of the candidates were offered the position the position remained open and defendant Gentry sought additional applicants from "persons of complainant's qualifications" (Appendix A, paragraphs 136-138).

28. Defendant Gentry took adverse employment action against the plaintiff by excluding the plaintiff from meetings of import to the plaintiff's fields of teaching, research and service either by not informing him of such meetings or by scheduling the meetings for times when the plaintiff could not attend because he was in class. (Appendix A, paragraphs 178-185.)

29. During the plaintiff's application for permanent tenure, defendant Gentry produced a fraudulent, false evaluation by hiding significant materials from decision makers and by misrepresenting the significance of the plaintiff's work. (Appendix A, paragraphs 141-189.)

30. During the period that the plaintiff's tenure dossier was being reviewed by the ultimate decision makers, the plaintiff's immediate supervisor, Theodore P. Frederickson, published an editorial on the front page of the University Daily Kansan, the student newspaper, attacking the plaintiff for his protected activities and for this lawsuit (Appendix A, paragraphs 200-205).

31. Statements in Frederickson's published editorial directly established that Frederickson was attacking the plaintiff for his protected activity (Appendix A, paragraphs 204-205), proving that this adverse employment action was motivated at least in part by an illegal motive.

32. During the plaintiff's application for permanent tenure, one decision maker directly expressed illegal discrimination against the plaintiff and said that the plaintiff's opposition to discrimination in the workplace was a valid reason for denying the plaintiff's tenure. (Appendix A, paragraphs 212-219.)

33. During the plaintiff's application for permanent tenure, one decision maker publicly and directly expressed that the plaintiff's opposition to discrimination

in the workplace would have an "adverse impact" on the School of Journalism. (Appendix A, paragraphs 204-205.)

34. Neither the decision-making committees nor defendant University's Provost or Chancellor disclaimed or disavowed the statements of illegal discriminatory animus contained in the plaintiff's tenure dossier and published in defendants' daily student newspaper. (Appendix A, paragraphs 218-220.)

35. Plaintiff informed all of the decision makers of the evidence of the corruption of his tenure dossier and of the likelihood that the tenure review had been motivated by an illegitimate motive. (Appendix A, paragraphs 195-197.)

ADDITIONAL PROOF OF ILLEGAL MOTIVATION AND PATTERN-AND-PRACTICE

36. Rule 406 of the Federal Rules of Evidence states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Plaintiff adduces the following evidence of past discriminatory and retaliatory conduct, evidence of procedural and due process irregularities and inconsistencies during tenure review, and evidence of deliberate spoliation as evidence of a pattern-and-practice of discrimination, retaliation and deliberate indifference to the plight of minority employees in its workplace.

Direct Evidence of Previous Retaliatory Acts

37. A trial on the merits in the case of Aquilino v. University of Kansas, No. 00-3150 (10th Cir.) and No. 99-CV-2231-KHV (D. Kan.), resulted in a jury verdict of liability for illegal Title VII retaliation against defendant University of Kansas. Even though the verdict was vacated on technical grounds, the vacating decision stated:

> At trial, KU stipulated that Dr. Aquilino engaged in protected activity, and on appeal it does not challenge the evidence showing the causal connection between Dr. Aquilino's protected activity and the allegedly adverse actions the university took against her.

Aquilino v. University of Kansas, 268 F.3d 930 (10th Cir. 2001). The appeal ruling in no way exonerated the defendants' conduct and the Court should be mindful of the defendants' proven and undenied retaliatory conduct.

38. In another case of a former faculty member who alleged due process violations and other violations of his civil rights against the defendant University of Kansas, the 10th Circuit Court of Appeals, ruling in the case of *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504 (10th Cir. 1998), expressed concern about the conduct of the defendant University's administration, stating:

> At the same time, we are certainly less than sanguine about some of the alleged actions taken by various University officials. In addition, the allegations of various violations of University policy cause us some discomfort.

This statement came in a ruling that otherwise went for the University in all respects. The fact that the Court nevertheless decided to make an issue of the conduct of these people is particularly significant in

that light.

Direct Evidence of Procedural Irregularities, Denials of Due Process, and Retaliation

39. The report of the Kansas Conference of the American Association of University Professors (AAUP), prepared after March, 2000, interviews with faculty employed by defendant University of Kansas, detailed these conditions on the Lawrence campus that are contrary to AAUP's standards:

> Violation of Academic Due Process procedures
>
> Denial of access to personnel files
>
> Undue influence by Administrators
>
> Retaliatory Acts
>
> Violations of Rules and Regulations/Handbook
>
> Failure to follow procedures in a consistent manner
>
> Apparent discrepancies between the procedures followed and the description outlined in the Faculty Handbook
>
> Misuse of Student evaluation forms
>
> Lack of Academic Community
>
> An Apparent failure to follow up on complaints of unfair treatment
>
> No meaningful response to complaints
>
> Fear, intimidation and retaliation seems all to pervasive on this campus

Defendant University of Kansas declares in its faculty handbook that it complies with AAUP standards. (Ap-

pendix A, paragraphs 222-223.)

Direct Evidence of Previous and Ongoing Illegal Conduct

40. Defendant University of Kansas was found out-of-compliance with Executive Order 11246 by the U.S. Office of Federal Compliance Programs (OFCCP) in 1982. Defendant University of Kansas entered into a conciliation agreement with the OFCCP, in which they promised to remedy their lack of compliance. In a letter to the Vice Chancellor, University Directors, Deans, Directors and Chairpersons, then-Chancellor Gene Budig explained:

> The OFCCP concluded that the University had not emphasized sufficiently the responsibilities that all administrators and supervisors have for the implementation of affirmative action and equal opportunity (see attachment.)

And:

> We are instituting, consequently, a policy whereby the annual performance evaluation of each person with managerial and supervisory responsibility will include review of equal employment opportunity efforts and results.

(Appendix A, paragraph 236) Defendant University did not comply with this promise and had no such policy in effect during the employment of the plaintiff.

41. In 1995, the OFCCP once again found defendant University of Kansas out of compliance with Executive Order 11246. Defendant University was found to have "failed to address the underutilization of minorities and females, and the corrective action it will take to correct the underutilization, by job groups." (Appendix A, paragraphs 232-234.)

42. Prior to their on-site review of defendant University, the OFCCP informed defendant University that among other data, they would require records of:

> c. Terminations. The regulations at 41 CFR 60-2.13(d) and (g) require an evaluation of the degree to which non-discrimination policy is carried out with respect to employee terminations. Also ee 60-2.25.
>
> This analysis shall consist of, for each group or job title, the total number of employee terminations, as well as the number of minority group and the number of female terminations.
>
> Please note that if you present terminations by job title, include the department and job group from which the person(s) terminated.

(Appendix A, exhibit 132, at fifth page, paragraph c.) The tenure process is an employment action that can and does result in termination, but the University does not track this employment action with regard to affected class.

43. Defendant University remains out of compliance with the tenets of Executive Order 11246 or their conciliation agreement with the OFCCP, because they deliberately do not produce records of their promotion and hiring employment actions per 41 C.F.R. 60-2.13(d) and (g), as directed by the OFCCP. (Appendix A, paragraph 243.)

44. Defendant has not complied with their OFCCP agreement to annually report on their previous year's Affirmative Action Plan. (Appendix A, paragraph 242.)

45. This evidence of defendant University's deliberate past and ongoing violation of EO 11246 is direct evidence of a continuing pattern-and-practice of discrimination against minority employees.

Appendix E

Evidence of Deliberate Indifference and Discriminatory Intent

46. In 1997, through a series of focus groups that involved a third of their minority faculty defendant University gathered anecdotal evidence that confirmed their minority faculty's concerns with their chances for retention. The transcripts of these sessions, a summary of the sessions and the final report on the sessions showed that among the minority faculty there was widespread dissatisfaction with the conditions of employment at the University. Defendant University's administration commissioned the focus groups and the resulting report, then attached a roster of participants and the complete transcript to the report so that they could avoid being compelled to release the report under the Kansas Open Records Act. (Appendix A, paragraph 97.)

Statistical Evidence of Discrimination

47. The U.S. Supreme Court has ruled that statistical evidence is probative of illegal discriminatory intent. The Tenth Circuit follows and has explained this ruling, saying:

> statistics alone may be used to establish a prima facie case of racial discrimination in a disparate treatment case. *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307-08, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977); *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 339, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977); *Weahkee v. Norton,* 621 F.2d 1080, 1083 (10th Cir. 1980). The Supreme Court has also held that statistics may be used to prove that the employer's racially neutral reason for termination is purely pretext. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804, 36 L. Ed. 2d 668, 93 S. Ct. 1817

(1973); *Anderson v. City of Albuquerque,* 690 F.2d 796, 802 (10th Cir. 1982). Even if United's contentions were true, McAlester's case does not rest solely on statistics but also rests upon individual instances of discriminatory treatment. *McAlester v. United Air Lines,* 851 F.2d 1249, 1260 (10th Cir. 1988). Plaintiff adduces the following statistical evidence of illegal discriminatory intent.

48. At the University of Kansas, as of the fall semester of 2000, white males of all ranks made up 62.99% of the total faculty in the ranks of Assistant Professor to Full Professor. The percentage of all males other than white is only 9.31% of the Assistant to Full Professor ranks. (Appendix A, paragraph 228.)

49. Although Hispanics make up 7% of the population in Kansas, at KU Hispanics make up only 2.23% of the faculty (Appendix A, paragraph 231.)

50. Between the years 1981 and 2001, the retention rate of minority males was so low that there was actually a loss (-3.71%) from the rank of Assistant Professor to Associate Professor. During the same time period, the gain of white males was +12.93%. This proves that there is a wide disparity (16.64%) between the retention of minority males (-3.71%) and white males (+12.93%). (Appendix A, paragraph 229.)

51. Plaintiff would have been only the third minority faculty member ever tenured by the defendant University's School of Journalism.

52. Plaintiff was the first faculty member ever turned down for tenure in defendant University's School of Journalism.

53. Defendant Gentry has a verifiable record of past and ongoing discrimination against minority employees

under his supervision, particularly Asian American and Hispanic males. (Appendix A, paragraphs 117-125.)

ARGUMENTS AND AUTHORITIES

54. Plaintiff brings this motion for summary judgment under Fed. R. Civ. P. 56(a), 56(c) and 56(d). Plaintiff seeks judgment as a matter of law. Plaintiff seeks a determination of liability against defendants for all or any of the claims and causes of action detailed herein. Plaintiff seeks a trial to determine damages and to resolve any material facts that remain in controversy.

55. Federal question subject matter jurisdiction is invoked by plaintiff with regard to his claims against KU pursuant to 28 U.S.C. § 1331 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-3 *et seq*. ("Title VII") and 42 U.S.C. § 1981 and, with regard to plaintiff's claims against Kautsch and Gentry, pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 1981 and 1983.

56. The established standards for proof of discrimination and of retaliation in Title VII cases were defined by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

57. The standards for proving discrimination have been explained by the Tenth Circuit:

> Under the McDonnell Douglas framework, the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." McDonnell Douglas, 411 U.S. at 802. Once the plaintiff has established a prima facie case, "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its employment ac-

> tion. See id. at 802. If the defendant makes this showing, the plaintiff must then show that the defendant's justification is pretextual. See id. at 804.

Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1226 (10th Cir. 2000).

58. Applying the U.S. Supreme Court's McDonnell Douglas framework, the Tenth Circuit has explained that a plaintiff establishes a prima facie case of illegal retaliation when he shows:

> (1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action."

Jeffries v. State of Kansas, 147 F.3d 1220 (10th Cir. 1998).

59. Once the plaintiff establishes a prima facie case, a rebuttable presumption arises that there has been discrimination and/or retaliation. The burden of production shifts to the defendants to articulate a legitimate business reason for the apparent discriminatory act(s). If the defendants do not respond or cannot articulate a legitimate business reason, the plaintiff prevails. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1991).

60. However, the "pretext" phase of the McDonnell Douglas framework only applies in those Title VII cases wherein the plaintiff relies on circumstantial evidence that requires an inference by the trier. In the event plaintiff can produce direct evidence that either discrimination or retaliation motivated a business decision even in part, Section 107 of the 1991 Civil Rights Act, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B) "provides that an unlawful employment practice is *estab-*

lished whenever race, color, religion, sex, or national origin was a motivating factor, even though other factors also motivated the practice." *EEOC Compliance Manual,* Section 8, page 8-16 (emphasis added). At this point, the employer cannot escape liability; it can only limit the damages available to the plaintiff by proving that there was at least one legitimate business reason for its decision. *Davey v. Lockheed Martin Corporation*, 301 F.3d 1204, at 121 (10th Cir. 2002). See also *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999), cert. denied 1999 U.S. LEXIS 4948 (1999).

61. Section 107 overrode the U.S. Supreme Court's earlier decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that ordered that "when a plaintiff in a Title VII case proves that [his race or protected activity] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [race or protected activity] into account." As of the passage of Section 107, the defendants can no longer avoid liability at this stage. They can only "limit the damages" as described in the paragraph above. (*Medlock*, at 553.)

62. As for the defendants' burden of persuasion after the plaintiff has established his prima facie case or adduced evidence that an employment act was motivated even in part by an illegitimate motive, the U.S. Supreme Court ruled in *Price Waterhouse*, (490 U.S. 228, at 246), that:

> In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its

> claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that [race] *did* make a difference to the outcome.

And:

> As these examples demonstrate, our assumption always has been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision.

(*Id.*, at 248) In other words, the U.S. Supreme Court has ruled that the defendants must be able to *prove* that they took a specific action with legitimate, non-discriminatory reasons. Plaintiff presents in this Memorandum several instances wherein defendants are logically *unable* to prove that legitimate, non-discriminatory reasons motivated their decisions.

63. Also in *Price Waterhouse* (at 250), the Supreme Court ruled that once an employee shows that his discharge was based in part on an illegitimate motive, then:

> [t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

64. The reasons proffered by the defendants must be specific and clear (see *Elmore v. Capstan*, Inc., 58 F. 3d 525, at 530 (10th Cir. 1995) and must be legal:

> Courts have occasionally found an employer's articulation of a reason insufficient when the reason is irrational on its face. See, e.g., *Loyd v. Phillips Bros.*, 25 F.3d 518, 524 (7th Cir. 1994)

> (long-standing policy of considering only members of male-dominated branch of company for promotion where members of female-dominated branch were equally qualified was not a legitimate nondiscriminatory reason); *EEOC v. Northwest Structural Components,* 822 F. Supp. 1218, 1221 (M.D.N.C. 1993) (articulated reason that the employee was a "complainer" insufficient where the only specific evidence of complaining were her concerns about disparate treatment because she was a woman).

Flores v. Preferred Tech. Group, 182 F. 3d 512 (7th Cir. 1999).

65. Consequently, there are among the acts of the defendants for which no motives can be considered legitimate. For example, when defendant Gentry falsified the plaintiff's record to the decision makers (Appendix A, paragraphs 162-168), he committed fraud. There are no legitimate business reasons for fraud.

66. Nor is defendant University insulated by some sort of statutory or judicial protection from discriminatory acts occurring during a tenure review. In 1972, when Congress amended Title VII to include colleges and universities, "it did not indicate that employment discrimination in the educational context should be treated differently than other contexts." *Title VII in the University: The Difference Academic Freedom Makes*, 59 U.Chi.L.Rev. 1317, at 1330.

67. In fact, the U.S. Supreme Court has made it clear that universities do not enjoy any special exemption from scrutiny of their employment decisions—including tenure review:

> When Title VII was enacted originally in 1964, it exempted an "educational institution with respect to the employment of individuals to per-

> form work connected with the educational activities of such institution." § 702, 78 Stat. 255. Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (i. e., tenured) academic positions. See H. R. Rep. No. 92-238, pp. 19-20 (1971). Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members. Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.
>
> The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions.

University of Pennsylvania v. EEOC, 493 U.S. 182, at 189 (1990).

Significance of the Evidence of Defendants' Suppression of Material Evidence and Failure to Keep and Maintain Records

68. Defendants deliberately withheld material evidence of past discriminatory intent, specifically the defendant University's correspondence with the OFCCP, from this

plaintiff and other previous plaintiffs who had brought civil rights lawsuits against the University.

69. Fed. R. Civ. P. 26(a)(1)(B), requires the disclosure of:

> a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

70. Plaintiff's Title VII complaint and this lawsuit allege—with particularity—discrimination based on race. Hence, all evidence in the defendants' possession that would establish the discriminatory climate for minority employees in the defendants' workplace would be required by Rule 26(a), as would all evidence regarding the defendants' record of violations of federal civil rights laws and executive orders.

71. It is long settled law that when a party hides evidence, they do so out of the knowledge that the evidence would harm their position. The Court should infer that Defendants' failure to produce this information regarding their non-compliance with federal civil rights law is such an indication of Defendants' knowledge that the information would harm their case. In *Dooley v. Altus Medical Corp.*, 1995 U.S. App. LEXIS 13492 (10th Cir. Okla. May 31, 1995), the 10th Circuit referred to the decision in *Nationwide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214 (1st Cir. 1982), which says:

> When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him.

72. Defendant University does not keep records of the ethnicity of applicants for promotion, in direct violation of 41 CFR 60-2.13(d) and (g), as detailed above. This deliberate failure to keep records required by federal civil rights laws is spoliation and precludes the defendants from offering any other statistical evidence to refute plaintiff's assertion of a pattern-and-practice of discrimination in their tenure reviews and the plaintiff "is entitled to the benefit of a presumption that the destroyed documents would have bolstered [his] case." *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418-1419, (10th Cir. 1987). (See also *Durant v. Independent School District No. 16*, 990 F.2d 560 (10th Cir. 1993), *Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 383 (2nd Cir. 2001), and *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93 (2nd Cir. 2001).)

Significance of the Adoptive Admission of the Statements of Illegal Animus

73. Regarding adoptive admissions, the Tenth Circuit has ruled that:

> when determining whether a party has manifested a belief in the truth of a document, the test is "whether the surrounding circumstances tie the possessor and the document together in some meaningful way." *Id.* (citations and internal quotation marks omitted). A document is sufficiently "tied" to the possessor "to the extent the adoptive party accepted and acted upon the evidence." *Id.*

Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, at 1268 (10th Cir. 1998) (citing *Pilgrim v. Trustees of Tufts College*, 118 F.3d 864 (1st Cir. 1997)). Consequently, the acceptance by Gentry and the University's administration and other decision makers of the statements of discriminatory and retaliatory animus made

by Kautsch in 1995, Hoy in 1999, and Frederickson in 2000 amounted to adoptive admissions of those statements. Those illegal motivations then became the motivations of defendant University.

The Hostile Workplace

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Gentry)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Kautsch)

74. In that same case, the Tenth Circuit articulated the criteria for assessing a hostile workplace claim:

> Hostile environment harassment occurs where a supervisor or co-worker's conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. See *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). To establish her claim, plaintiff must show both that the conduct to which she was subject was "severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive," and that she "subjectively perceived the environment to be abusive." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993).

Wright-Simmons, at 1269. In the instant case, defendant Kautsch in 1995 initiated adverse employment actions that most definitely intimidated the plaintiff and interfered with his work performance (Appendix A,

paragraphs 46-71). From that point in time, defendant University of Kansas at no time took action to remedy the hostility of Kautsch, and then of Gentry (Appendix A, paragraphs 142-189), of Frederickson (Appendix A, paragraphs 200-205), and of others toward the plaintiff in their workplace. Throughout the period of the plaintiff's employment with defendant University, there remained in the work environment of the plaintiff discernible hostility, harassment, intimidation, persecution, degradation, and exclusion, to a degree that cannot possibly be acceptable to any reasonable person.

75. Defendant University is liable for this hostility. The Tenth Circuit has ruled that:

> we have identified three bases for holding an employer liable: (1) if the conduct violating Title VII occurred within the transgressor's scope of employment; (2) if the employer knew, or should have known about, the violation and failed to respond in a reasonable manner; or (3) if the transgressor acted with apparent authority or was aided in violating the statute by virtue of their agency relationship with the employer. See *Bolden v. PRC, Inc.*, 43 F.3d 545, 551 n.1 (10th Cir. 1994); *Sauers v. Salt Lake County,* 1 F.3d 1122, 1125 n.3 (10th Cir. 1993).

Wright-Simmons, at 1269. Defendants Kautsch, Gentry, and Frederickson were each acting under the authority of their positions with defendant University as plaintiff's supervisors. Defendant University was made aware of the hostility from December 1995 and many times subsequently. Defendant University "failed to respond in a reasonable manner" and is liable for the hostility.

Appendix E

The Tainted Tenure Review of the Plaintiff

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Gentry)

76.The Tenth Circuit articulated in *Kenworth v. Conoco, Inc.*, 979 F. 2d 1462, at 1471 (10th Cir. 1992) (and cited in *Medlock*) that:

> A plaintiff will be entitled to the burden-shifting analysis set out in Price Waterhouse upon presenting "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [discriminatory and/or retaliatory] attitude." Ostrowski v. Atlantic Mut. Ins. Cos., 968 F. 2d 171, 182 (2d Cir. 1992). Price Waterhouse is also applicable on the basis of circumstantial evidence arising from the sequence of events if the evidence is adequate to demonstrate that an improper factor was a substantial motivation in the challenged decision. *Id.* at 183.

The plaintiff in the instant case has adduced direct evidence of an illegitimate motive in the form of written statements by decisionmakers that establish animus against the plaintiff for his minority status, protected speech and activity were motivating factors in the decision to terminate him via tenure review, as well as in other employment actions (Appendix A, paragraphs 212-221). Hence, plaintiff has adduced evidence sufficient to establish liability. Defendants must now prove by a preponderance of evidence that they would have reached the same decisions absent the illegitimate motives, which would not protect them from liability, but only limit damages due the plaintiff.

77. Even if the defendants argue that the termination of the plaintiff is the issue and that they have proffered legitimate reasons for terminating the plaintiff under tenure review, the decision makers at the time of the decision were relying on false information, therefore none of them could have come to a justifiable negative decision.

78. The Supreme Court also ruled in *Price Waterhouse* that when presenting evidence to prove its legitimate reasons, "[a]n employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." (*Price Waterhouse*, 490 U.S. at 252.) Because the defendants tainted the plaintiff's tenure review, no decision makers in the entire process could have known whether or not the plaintiff's record was deserving of an award of tenure. Hence, the defendants cannot produce a lawful motivation for the termination of the plaintiff via tenure review, *which motivated them at the time of the decision.* (See also *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057 (11th Cir. 1994) and *Burdine,* 450 U.S. 248.) The defendants cannot possibly adduce a legitimate, non-discriminatory or non-retaliatory motive for the decision to terminate the plaintiff via tenure review. Judgment should issue for the plaintiff and the Court should set a date for a trial to determine damages.

79. Nor do the decisions of the higher bodies in defendant University's decision-making chain provide legitimacy. In *Price Waterhouse*, 490 U.S. at 251, the U.S. Supreme Court described a collegial decision-making process that closely resembles that of defendant University's:

> Price Waterhouse invited partners to submit comments; that some of the comments stemmed

> from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations.

Plaintiff's proffered evidence establishes that defendant University's School of Journalism invited reviewers to submit written comments; that some of the written comments contained statements expressing discriminatory and retaliatory animus; that an important part of the J-School P&T Committee's, UCPT's, Provost's and Chancellor's decision on Cuenca was an assessment of the submitted comments; and that those decision makers in no way disclaimed reliance on the discrimination- and retaliation-linked evaluations—even though the plaintiff in the instant case pointed out to those higher bodies the inconsistencies and illegal motives, prior to their decisions.

80. Several Circuits have addressed this issue and in an ADEA case, the Seventh Circuit ruled that "An employer cannot escape responsibility for willful discrimination by multiple layers of paper review, when the facts upon which the reviewers rely have been filtered by a manager determined to purge the labor force of older workers." Gusman v. Unisys Corp., 986 F. 2d 1146 (7th Cir. 1993). The Eight Circuit has followed this principal (Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051 (8th Cir. 1993), as has the Sixth (Wells v. New Cherokee Corp. 58 F. 3d 233 (6th Cir. 1995). Gentry, Musser, and Shulenburger tainted the plaintiff's tenure review in this fashion and the subsequent reviews do not provide defendants a safe harbor from their misconduct.

81. Additionally, Justice O'Conner, in her *Price Waterhouse* concurrence wrote:

> Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions. See, e.g. *Fields v. Clark University*, 817 F. 2d 931, 935-937 (CA1 1987) (where plaintiff produced "strong evidence" that sexist attitudes infected faculty tenure decision, burden properly shifted to defendant to show that it would have reached the same decision absent discrimination); *Thompkins v. Morris Brown College*, 752 F. 2d 558, 563 (CA11 1985) (direct evidence of discriminatory animus in decision to discharge college professor shifted burden of persuasion to defendant).

(*Id.*, at 273.) The decision in *Fields*, cited by Justice O'Conner, stated:

> The district court's finding that [retaliation or racial] discrimination "impermissibly infected" the decision not to grant [Cuenca] tenure appears to us to be the equivalent of a finding that [he] proved by direct evidence that discrimination was a motivating factor in the decision. This finding cannot be reconciled with the court's putting the burden on [Cuenca] to prove that [he] was entitled to tenure.

(*Fields*, at 937.)

82. It follows, then, that although this case involves a university professor terminated after tenure review, it does not revolve around the merits of the tenure decision. The causes of action in this case are actions taken by the defendants to discriminate against plaintiff and

to retaliate against him for his protected speech and activity by taking specific actions that "impermissibly infected" his application for permanent tenure. Those actions were separate from the actual consideration of the plaintiff's tenure review. For example, when defendant Gentry lied in his review letter that the plaintiff didn't have refereed works (Appendix A, paragraphs 170-176), it was that act, not the eventual decision that came from it, that is the cause of action. The termination is merely the damage wrought by the wrongdoing. The evidence adduced by plaintiff herein regarding his qualification for tenure is proffered solely to prove that the decision to deny him tenure cannot be justified by any legitimate motive.

83. By assessing the plaintiff's tenure dossier, which included impermissible motives, and then failing to disavow or disclaim them, all of defendant University's decision makers acquiesced their acceptance and agreement with those statements.

84. The Supreme Court further stated that, "[c]ertainly a plausible—and one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision *did in fact take into account all of the partners' comments*, including the comments that were motivated by stereotypical notions about women's proper deportment." (*Price Waterhouse*, at 256. Emphasis added.) In the instant case, the J-School P&T Committee, the UCPT, the Provost and the Chancellor were the "Policy Board" and they did not disclaim or refute the discriminatory and retaliatory animus in the written comments of Hoy and Frederickson. Defendant University is liable for the decisions made at all levels of the review. Defendants cannot articulate legitimate non-discriminatory reasons for not disclaiming the discriminatory and retaliatory com-

ments of some of the decision makers and not fully investigating the claims of the plaintiff that the review had been tainted. Judgment should issue for the plaintiff.

85. The decision makers' accepted statements of discriminatory and retaliatory animus prove both the causal connection between the plaintiff's protected activities and an illegitimate motive for the defendant University's decision to deny the plaintiff's request for permanent tenure. Plaintiff has thereby adduced direct evidence that his termination was motivated at least in part by an illegal motivation and liability is established.

86. Defendants cannot prove by a preponderance of evidence that they would have taken the same adverse action absent the illegitimate motive, because previous illegal action by defendant Gentry and others, taken to misrepresent the plaintiff's actual record, precluded the decision makers from basing the adverse employment action on a valid examination of the plaintiff's actual record. Consequently, defendants cannot articulate a legitimate, non-discriminatory business reason that actually motivated them at the time of the decision, precluding limitations on damages.

87. Alternatively, even when applying a strict McDonnell Douglas framework, plaintiff argues that he has established that he is a member of a protected class, he has established a prima facie case that he was a victim of discrimination and retaliatory adverse employment actions, and that the defendants cannot articulate legitimate business decisions for their actions. The defendants cannot answer and judgment should issue for the plaintiff and the Court should set a date for a trial to determine damages.

Appendix E

The "New Media Leader" Search

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Gentry)

88. Defendants discriminated against plaintiff by intentionally denying him the position of New Media Leader in the autumn of 1997 (Appendix A, paragaphs 127-138).

89. Quoting *McDonnell Douglas* in Hysten v. Burlington Northern & Santa Fe Ry., 296 F.3d 1177, (10th Cir. 2002), the Tenth Circuit explained that a prima facie case of discrimination is established:

> by showing (i) that [plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

The Tenth Circuit panel said these were the elements of the "archetypal discrimination case, an employer's discriminatory failure to hire a qualified employee." (*Id.*)

90. The plaintiff is a member of a protected class, which satisfies the first McDonnell Douglas criterion. The plaintiff applied for an open position and was found qualified, which satisfies the second criterion. The plaintiff was denied the position, which satisfies the third criterion. Defendants sought additional applicants from persons of complainant's qualifications, which satisfies the fourth criterion.

91. Hence, the Plaintiff's evidence of this prima facie case of discrimination conforms exactly to the U.S. Supreme Court's *McDonnell Douglas* criteria, and he has thereby established a prima facie case of discrimination against defendants University of Kansas and Gentry for this cause of action. The illegal discriminatory animus solicited and accepted by Gentry during the plaintiff's tenure review establishes the motive for this action, as well. Liability is established.

92. Because this discriminatory business decision was motivated by a discriminatory and retaliatory animus against the plaintiff for his KHRC/EEOC complaint and other protected activity up to and during the search, as expressed during the plaintiff's tenure review, the plaintiff has also established a prima facie case of retaliation against defendants University of Kansas and James K. Gentry in this cause of action and liability is established.

93. Defendants cannot articulate a legitimate business decision for this presumed discrimination and retaliation, precluding limitations on damages.

Discriminatory and Retaliatory Dismissal Proceedings Against Plaintiff

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Kautsch)

9 4Defendant Kautsch's unauthorized non-reappointment action against the plaintiff in December 1995 (Appendix A, paragraphs 46-71), was an adverse employment action taken in direct retaliation for plaintiff's Title VII and First Amendment rights to freedom

from discrimination in employment and from retaliation for protected activity and speech.

95. Kautsch' action was discriminatory in that no other faculty member had been subjected to similarly severe disciplinary action. Kautsch's expressed reason that the action was taken because the plaintiff was "making demands and stating expectations," directly connected Kautsch's action to the plaintiff's exercise of his rights under the First Amendment and Title VII, which proves that the plaintiff's protected activity was a motivating factor in this adverse employment action. Liability is established.

96. Defendants cannot prove by a preponderance of evidence that they would have taken the same adverse action absent the illegitimate motive, because the adverse employment action was undertaken exclusively in response to the plaintiff's protected speech and opposition to illegal discriminatory actions in the workplace and was not authorized by any University of Kansas policy or procedure, precluding limitations on damages.

The Deliberate Indifference of Defendant University of Kansas

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

97. The Tenth Circuit has explained that the deliberate indifference of supervisory employees to the illegal acts of their subordinates establishes a *de facto* discriminatory and/or retaliatory policy:

> Public officials with notice of misbehavior by their subordinates must not take actions which communicate that they encourage or condone such behavior. Stoneking, 882 F.2d at 729. Such conduct as failing to discipline or failing to safe-

> guard against a known danger establishes an unwritten policy or custom for purposes of section 1983.

Gates v. Unified Sch. Dist. No. 449, 996 F.2d 1035, at 1037 (10th Cir. 1993). The Tenth Circuit, in another case, also ruled:

> Moreover, in the context of other civil rights legislation, conduct has been described as intentional when "'the policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy, training, protocol, or custom.'" Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996) (construing Rehabilitation Act) (quoting Penney v. Town of Middleton, 888 F. Supp. 332, 340 (D.N.H. 1994). n8 See also Canton v. Harris, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989).

Tyler v. City of Manhattan, 118 F.3d 1400, at 1405 (10th Cir. 1997).

98. Defendant University of Kansas established an unwritten policy of tolerance of violations of plaintiff's federally-protected rights by "failing to discipline or failing to safeguard against a known danger." (*Gates*, 996 F.2d 1035, at 1037.)

99. From December 1995 (Appendix A, paragraphs 54-76) and onward, defendant University's chief operating officer, Provost David E. Shulenburger and chief executive officer, Chancellor Robert E. Hemenway, were clearly aware that defendant Kautsch had asked their permission to terminate plaintiff in proceedings that they had subsequently refused to permit because they were outside the bounds of the defendant University's regulations and operating procedures. Kautsch's ac-

tions were clear and fair warning that he was capable of acting outside those regulations and procedures in regard to the plaintiff and that he was passionately determined to terminate the plaintiff. From that moment on, it was Provost Shulenburger's and Chancellor Hemenway's responsibility to take whatever action was necessary to protect the plaintiff from further violations of his rights and to protect him from additional illegally motivated adverse employment actions. From then on, it was their responsibility to supervise and scrutinize every employment action and decision involving the plaintiff, carefully verifying that there were no irregularities, inconsistencies, violations of University policies and procedures, or other evidence of illegal motivation.

100. Defendant University's deliberate indifference was evidenced in their refusal to investigate the claims of discrimination and retaliation made by the plaintiff from December 1995 through the present day.

101. Defendant University's deliberate indifference was evidenced in their refusal to protect the plaintiff from an intentionally tainted performance evaluation in the form of tenure review, even though plaintiff presented them with evidence of the tainting of the tenure review prior to their final decision (Appendix A, paragraphs 195-198).

102. Defendant University's administration has also exhibited this deliberate indifference to violations of Title VII and other civil rights law in their refusal to comply with EO 11246, as detailed above in paragraphs 40 through 45. Defendant University's failure to monitor their workforce for evidence of discrimination has established a custom of tolerance of discrimination in their workplace and evidences a pattern and practice of discrimination.

103. Defendant University's refusal to discipline managerial employees for violations of their subordinate's rights and a permissive attitude toward retaliation against employees has established a custom of tolerance of retaliation and evidences a pattern and practice of discrimination and retaliation.

104. Defendant University of Kansas' deliberate indifference to the actions against the plaintiff denied the plaintiff an equal opportunity and equal protection. Defendants cannot articulate a legitimate business reason for this disparate treatment and judgment should issue for the plaintiff.

105. Defendants are precluded from limiting damages due to plaintiff for this action because any reason proffered by defendants for their failure to initiate an investigation or to take remedial action fails to rise to the level of legitimacy because the University's policies and procedures provide for protection of employees against discrimination and retaliation. (Appendix A, paragraphs 6-8.)

106. The deliberate indifference of the defendant University's ultimate decision makers to the obvious evidence of illegal motivation in the plaintiff's tenure review dossier denied the plaintiff an equal opportunity, equal protection, and freedom from retaliation and adverse employment action. Defendants cannot articulate a legitimate motivation for this discriminatory and retaliatory adverse employment action and judgment should issue for the plaintiff.

107. Defendants' deliberate indifference is probative of a pattern and practice of discrimination and retaliation against the plaintiff.

108. Defendants' deliberate indifference is an ongoing violation of the plaintiff's Title VII and Fourteenth Amendment rights.

Defendant's Suspension of the Investigation of Plaintiff's Internal Complaint

(Title VII claim and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

109. The U.S. EEOC, in its Compliance Manual, Section 8, (Appendix A, exhibit 143), advises that suspending an internal complaint investigation is an example of an adverse employment action. See also *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir.), *cert. denied*, 506 U.S. 906 (1992).

110. Defendant University's Director of Equal Opportunity Bryan's confirmation that he suspended the investigation of plaintiff's complaints of discrimination and retaliation because of failed mediation establishes the causal connection between the plaintiff's protected activity and the discriminatory and retaliatory termination of the internal investigation (Appendix A, paragraphs 107-116). Hence, this discriminatory and retaliatory adverse employment action is proven to have been motivated at least in part by illegal retaliation. Liability is established.

111. Defendants cannot prove by a preponderance of evidence that they would have taken the same adverse action absent the illegitimate motive, because it has been established to be outside the bounds of defendant University's policies and procedures and was not authorized by any legitimate business policy or procedure of the defendant University, precluding limitations on damages.

Appendix E

The False Evaluations of the Plaintiff

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Gentry)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Kautsch)

112. The false evaluations of the plaintiff, first produced by defendant Kautsch in May, 1996 (Appendix A, paragraphs 79-82), and then by defendant Gentry during the plaintiff's tenure review of November, 1999 (Appendix A, paragraphs 142-189), are adverse employment actions, as defined by the Tenth Circuit in *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998).

113. Evidence in the record proves that defendant Kautsch initiated an adverse employment action against plaintiff in the form of a false evaluation, within 10 days of the plaintiff's complaint of racially motivated discrimination. Frederickson connected the adverse employment action to the plaintiff's previous protected activity. Therefore, it has been proven that the adverse employment action was motivated at least in part by an illegitimate retaliatory motive. Liability is established.

114. Frederickson also established that the plaintiff's performance was better than the review reported, and Defendant Kautsch later raised the plaintiff's performance ratings, proving that the original performance review did not reflect the plaintiff's actual record. Hence, defendants cannot prove by a preponderance of evidence that they would have taken the same adverse ac-

tion absent the illegitimate motive, because the adverse employment action did not reflect the plaintiff's actual performance record and was motivated exclusively by the plaintiff's protected speech and opposition to illegal discriminatory actions in the workplace. Limitations on damages due the plaintiff are thereby precluded.

115. During the plaintiff's tenure review, defendant Gentry fraudulently misrepresented the plaintiff's performance record and deliberately withheld significant evidence of the plaintiff's record from decision makers (Appendix A, paragraphs 142 to 189). Gentry included in the plaintiff's tenure dossier a letter that directly expressed illegal motivation for the decision to deny the plaintiff's tenure application(Appendix A, paragraphs 212 to 220). Liability is established.

116. Gentry's actions prevented the University from making a legitimate decision regarding the plaintiff's suitability for a grant of tenure. Therefore, defendants cannot prove by a preponderance of evidence that they had a legitimate non-discriminatory reason for denying plaintiff's tenure, which motivated them at the time of the decision, precluding limitations on damages.

Defendant Kautsch's December 1995 "special review" of the Plaintiff

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Kautsch)

117. The evidence in the record proves that in December of 1995, defendant Kautsch took a discriminatory and retaliatory adverse employment action against the plaintiff in the form of an illegal performance re-

view with conditions that violated the plaintiff's exercise of his First Amendment and Title VII rights, (Appendix A, paragraph 67) which proves that the plaintiff's protected activity was a motivating factor in the adverse employment action taken against the plaintiff. Liability is established.

118. This adverse employment action by defendant Kautsch was an action that was outside the defendant University's policies and procedures. Hence, defendants cannot prove by a preponderance of evidence that they would have taken the same adverse action absent the illegitimate motive, because the adverse employment action was not authorized by any legitimate business policy or procedure of the defendant University, precluding limitations on damages.

The "General Manager of the Integrated Media Lab" Search

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Kautsch)

119. Defendants discriminated against plaintiff by intentionally denying him even the opportunity to apply for the position of general manager of the Integrated Media Laboratory in the spring of 1996 (Appendix A, paragraphs 77-78).

120. Defendants cannot articulate a legitimate business reason for this apparent discrimination, because University policy expressly forbids such unilateral employment action (Appendix A, paragraph 78). Judgment should issue for the plaintiff.

Appendix E

Frederickson's Front Page Editorial

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

121. The hostile front-page editorial by Professor Frederickson (Appendix A, paragraphs 200-205) is an actionable adverse employment action against defendant University, as explained by the Tenth Circuit in *Gunnell*:

> We must next decide under what circumstances such co-worker hostility can be considered intentional retaliation on the part of the employer. We perceive at least three factual scenarios involving co-worker retaliatory harassment: (1) co-workers, without the knowledge of supervisory or management personnel, independently take it upon themselves to harass the plaintiff in retaliation for engaging in protected activity; (2) supervisory or management personnel know about and acquiesce in or condone the retaliatory harassment by the plaintiff's co-workers; and (3) supervisory or management personnel orchestrate the campaign of co-worker harassment. Gunnell, by advocating a "known or should have known" standard, would hold employers liable in each of the three scenarios. However, because harassment must be intentional on the part of the employer, we hold that an employer can only be liable for co-workers' retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a [**32] manner as to condone and encourage the co-workers' actions. See Knox, 93 F.3d at 1333-35 (in dicta, approving an instruction that would hold an

employer liable for "retaliation . . . committed by co-workers with the knowledge and acquiescence of the employer.")

(*Id.*, at 1265.) Defendant University's administration was aware of Frederickson's hostility toward the plaintiff because it appeared on the front page of the defendant University's student newspaper. Defendant University's administration acquiesced in Frederickson's hostility by refusing to disavow or disclaim the hostility by the plaintiff's supervisor.

122. Since the action by Frederickson was taken in response to plaintiff's protected speech and opposition to illegal discrimination, defendants cannot prove by a preponderance of evidence that they would have taken the same adverse action absent the illegitimate motive, because the action would not have occurred absent the plaintiff's protected activity, precluding limitations on damages.

Discriminatory and Retaliatory Application of Disciplinary Action Against Plaintiff

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Gentry)

123. In December, 1995 (Appendix A, paragraphs 46-71), and May, 1996 Appendix A, paragraphs 79-87), defendant Kautsch took extreme action against the plaintiff that violated the University's policies and procedures (Appendix A, paragraphs 73-75). The defendant University's administration was aware of these actions. The defendant University's administration initiated no disciplinary action against Kautsch.

124. Throughout the summer and fall of 1999, defendant Gentry deliberately provided false information to the University (Appendix A, paragraph 142-189), in direct violation of defendant University's policies and procedures (Appendix A, paragraph 198). Plaintiff made defendant University's administration aware of these actions in February of 2000 (Appendix A, paragraph 197). The defendant University's administration initiated no disciplinary action against Gentry.

125. In March, 2000, the plaintiff was accused of violating University policy by rescheduling his classes to attend a civil rights trial in federal court (Appendix A, paragraphs 206-209). Defendant University initiated disciplinary action against the plaintiff.

126. Defendants' disciplinary action against the plaintiff in March 2000 was both discrimination, probative of disparate treatment of plaintiff compared with non-minority employees of the University, and a retaliatory adverse employment action.

127. Plaintiff has adduced evidence that defendants Kautsch and Gentry violated tenets of the University's code of conduct that authorized disciplinary measures up to and including termination and that they were not disciplined for those violations. Comparatively, plaintiff was disciplined for a lesser violation that did not rise to the level of an offense for which termination is authorized. The Tenth Circuit has ruled:

> When comparing the relative treatment of similarly situated minority and non-minority employees, the comparison need not be based on identical violations of identical work rules; the violations need only be of "comparable seriousness." *Id.* (citing McAlester, 851 F.2d at 1261).

Elmore v. Capstan, 58 F.3d 525, at 530. The violations of defendants Kautsch and Gentry were comparable in

that they were violations of the Faculty Code of Conduct, but they were actually much more serious in that they rose to a level of violation for which termination is authorized.

128. By initiating disciplinary action against the plaintiff and not against defendants Kautsch and Gentry, defendant University's administration subjected the plaintiff to disparate treatment.

129. By applying disciplinary action against plaintiff because of his opposition to defendants' discriminatory policies and actions, defendant University initiated a retaliatory adverse employment action against plaintiff.

130. Defendant University's Provost and Chancellor accepted without protest the statements of discriminatory and retaliatory animus in plaintiff's tenure dossier and published in their daily student newspaper, establishing acquiescence with those illegal motivations. Liability is established.

131. Defendant can articulate no legitimate business reason for the discrimination and/or retaliation against the plaintiff, precluding limitations on damages.

Discriminatory and Retaliatory Salary Increase of the Plaintiff

(Title VII and 42 U.S.C. § 1981 claims against Defendant University of Kansas)

(42 U.S.C. § 1981 and 42 U.S.C. § 1983 claims against Defendant Kautsch)

132. When, in May of 1996, defendant Kautsch gave the plaintiff the lowest salary increase of any other tenure-track faculty member (Appendix A, paragraphs

80 and 94), Kautsch violated the plaintiff's Title VII and Fourteenth Amendment rights.

133. Frederickson then connected the plaintiff's protected activity to the discriminatory salary increase and liability is thereby established.

134. Defendants cannot articulate a legitimate, nondiscriminatory business reason for this violation, precluding limitations on damages.

Damages

135. The U.S. Supreme Court has stated that when fashioning remedies in Title VII cases, "the lower courts have the responsibility to provide the most complete relief possible, and must strive to make the victim whole by placing [him], as near as may be, in the situation [he] would have occupied had the wrong not been committed." *Title VII in the University: The Difference Academic Freedom Makes*, 59 U.Chi.L.Rev. 1317, at 1326, citing the Civil Rights Act of 1991 § 102, and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975).

136. The damage done to an educator who is denied tenure is particularly severe:

> Most if not all tenure decisions are on an "up or out" basis -- if the educator is not granted tenure, she is in most cases given a one-year terminal contract. Most educators spend between four and seven years at a university before a tenure decision. Upon re-entering the job market, the educator who has been denied tenure will be older than most other candidates. In addition, a denial of tenure damages an educator's reputation and will greatly inhibit the individual's

chances of receiving a teaching position at another university.

The Civil Rights Act of 1991 provides for compensatory and punitive damages for successful Title VII plaintiffs. Some might argue that courts should award such damages in lieu of reinstatement with tenure, especially if the University has shown itself to be hostile to the plaintiff due to race or gender. The damages available under Title VII, however, are paltry compared the earnings of a tenured faculty member during her career at a university. Backpay awards are limited by a duty to mitigate; compensatory and punitive damages allowed are limited by a $ 200,000 cap. Tenure, on the other hand, is a life contract. To refuse reinstatement due to hostility in the university would essentially amount to a triumph for discriminatory attitudes; those who wanted to keep out minorities or women will have prevailed. Moreover, if the plaintiff would be uncomfortable with reinstatement, she has the option of requesting alternative remedies.

Finally, and most importantly, no amount of money damages can substitute for the security that tenure provides an educator. Tenure insures the intellectual independence of educators; it allows them to teach, study and publish without the fear of arbitrary dismissal. A grant of tenure means that an educator may be dismissed only for adequate cause. A tenured educator at a public university has constitutionally protected property rights which cannot be eviscerated without due process of law. Even in private universities, in order to dismiss a tenured

professor, the university must usually follow elaborate procedures, with the burden falling on the university to prove adequate cause. Furthermore, since the educators who are most in danger of being denied tenure on discriminatory grounds are also the most likely to research and publish in areas that challenge status quo predispositions, discriminatory tenure denials have external effects on the community at large, which suffers the loss of fresh ideas and perspectives. Insisting on money damages as the only remedy available to prevailing plaintiffs in tenure discrimination cases fails to address the public interest, which is better served by reinstatement with tenure where the plaintiff prefers that remedy.

The fair reconsideration remedy is also unlikely to vindicate the plaintiff's rights. First, the faculty and administrators who discriminated against the plaintiff the first time around may be the same ones making the court-ordered "nondiscriminatory" tenure decision. Because academic decisionmaking is so subjective, those with a race or sex bias might consciously or subconsciously devalue the work of a woman or minority member when re-evaluating her. The same subconscious devaluation may come into play by faculty or administrators unable to ignore the fact that the plaintiff is a successful Title VII complainant. Furthermore, faculty may well find it impossible to ignore changes in the school's financial situation, student enrollment, and the faculty hiring that may have occurred in the years since the inception of the suit. The likelihood of such difficulties makes a fair recon-

> sideration of the tenure decision seem unlikely at best. The university may, of course, grant tenure to the plaintiff after a court-ordered reconsideration, either out of a desire to avoid further litigation, or out of an honest assessment of the plaintiff's qualifications. However, Title VII's "make whole" provision ought not require successful plaintiffs to go through the decision-making process a second time.

Id., at 1332.

137. Acts of retaliation against Title VII complainants in a workplace have been established as constituting irreparable harm. In *Garcia v. Lawn,* 805 F.2d 1400, 42 FEP 873 (9th Cir. 1986), the Ninth Circuit ruled:

> This case, however, involves more than a claim of harm to the plaintiff and his family as the result of the termination. The claimed violation of the law in this case is retaliatory action for the exercise of Title VII rights, action which, if plaintiff is correct, will have a deleterious effect on the exercise of these rights by others.
>
> That the chilling effect of retaliatory activity can constitute irreparable harm has been recognized by the Second Circuit. In Holt v. Continental Group, Inc., 708 F.2d at 91, it stated:
>
> > A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the plaintiff in her effort to protect her own rights. These risks may be found to constitute irreparable injury.

As a leading treatise has commented, "the courts will more readily grant [injunctive] relief where allegations of retaliation are involved, because such conduct is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges." B. Schlei & P. Grossman, supra, at 1063. The harm is a continuing one so long as the retaliation remains in effect.

138. Plaintiff seeks an order from the Court for prospective relief to include the following conditions:

A. Immediate and permanent policy allowing opening of all tenure proceedings and materials to public scrutiny, upon request of employee.
B. Immediate and permanent policy allowing opening of all performance evaluation appeal proceedings and materials to public scrutiny, upon request of employee.
C. Immediate and permanent policy allowing opening of all disciplinary proceedings and materials to public scrutiny, upon request of employee.
D. Immediate establishment of specific, objective-based criteria for tenure review and performance evaluation in all units.
E. Immediate publication on paper of Faculty Handbook, distributed to all faculty.
F. Requirement for all new tenure-track hires to have clear, concise, binding contract specifying tenure requirements (as is required by AAUP).
G. Immediate appointment of a proctor to monitor all tenure reviews and other termination proceedings at the University of Kansas.

H. Immediate restructuring of Office of Equal Opportunity into two offices: Office of Equal Opportunity and Office of Affirmative Action.
I. Hiring of new Director of Equal Opportunity, approved by a court appointed proctor.
J. Hiring of new Director of Affirmative Action, approved by a court appointed proctor.
K. Reestablishment of faculty Affirmative Action committee, members approved by a court appointed proctor, charged to oversee all activities of the Offices of Affirmative Action/Equal Opportunity and to review all complaints to the Offices of Affirmative Action/Equal Opportunity, with authority to render the University's final, binding decisions.
L. Immediate restructuring to conform with all current AAUP Policy Documents and Reports and OFCCP guidelines not otherwise listed here.
M. Appropriate disciplinary action against David E. Shulenburger.
N. Appropriate disciplinary action against Myron A. Kautsch.
O. Appropriate disciplinary action against James K. Gentry.
P. Immediate reinstatement of Mike Cuenca to the faculty as a tenured associate professor in a unit of University of Kansas other than the School of Journalism, with indefinite designation as research faculty member.
Q. Immediate two-year paid leave of absence for Mike Cuenca, from date of reinstatement.
R. Retroactive raise of Mike Cuenca's salary to amount equal to percentage of raise given to Gary Hawke (22%), effective academic year 1996-1997 (including all benefits).

S. Retroactive raise of Mike Cuenca's salary to $75,000 annually (amount paid to successful "New Media Leader" applicant), effective academic year 1999-2000 (including all benefits).
T. Front pay and full benefits until normal retirement age (alternative to list items P and Q).
U. Full-page advertisements in the University Daily Kansan, Lawrence Journal-World, Topeka Capital-Journal, Wichita Eagle, KC Star, Chronicle of Higher Ed, Academe, and Editor & Publisher, consisting of a description of the corrective action described above and apologies to Mike Cuenca from Kautsch, Gentry and Frederickson.
V. All legal fees and costs.

139. Plaintiff seeks a trial to determine additional monetary damages:

W. Compensatory damages for his mental anguish, pain and suffering and other non-pecuniary losses;
X. Punitive damages against individual defendants Myron A. Kautsch and James K. Gentry, and
Y. Such other relief as the Court deems just and equitable.

WHEREFORE, the plaintiff, above-named, prays that the Court issue an order granting him summary judgment or partial summary judgment.

Respectfully submitted,

s/Michael R. Cuenca
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